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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

GARY D. PIGNATO,

Petitioner,

vs.

AMERICAN TRANS AIR, INC.

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH DISTRICT

GARY D. PIGNATO *pro se*

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240 pp

QUESTIONS PRESENTED

1. Where, in connection with 38 U.S.C. Sections 2021 and 2024 and related provisions governing the employment rights of veterans and reservists, Congress has

- made explicit and repeated declarations to the effect that these statutory provisions are vital to the national security,

- long maintained and consistently reinforced the substantive and procedural aspects of the rights in question, and

- provided extraordinary, virtually unique enforcement mechanisms benefiting protected reservists

are the lower federal courts free to narrowly contrue the statutory provisions in question?

2. Is the ruling below consistent with earlier federal decisions interpreting the

Vietnam Veterans Readjustment Act and its predecessors?

3. Does the decision below transgress federal policy encouraging safety in commercial avaition by compelling airline pilots who are suffering from stress to conduct flights notwithstanding such stress?

4. If a military reservist or Guardsman is discharged by his or her civilian employer in part for alleged good cause and in part for scheduling problems arising from the reservist's military duties, does such a discharge violate 38 U.S.C. Section 2021 or Section 2024?

5. Is it a proper construction of the Vietnam Veterans Readjustment Act, and consistent with the declared security and readiness concerns of the U.S. Congress, to hold that "irrational," "wrong," and "harsh"

discharges of reservists are permissible under the Act?

6. When a commercial airline insists that its pilots and copilots use only their days off to discharge military training duties, and refuses a reservist's request to perform some of his military duty on so-called "reserve" or "blank" days, has the company violated 38 U.S.C. Section 2024 or 2021?

7. Are civil suits brought under the act in question subject to the same rules governing burden of proof that apply in cases of employment discrimination brought under the civil rights provisions of federal law?

8. If the answer to question "7" above is in the affirmative, and cases like the one at bar are in fact subject to the same burden-of-proof rules, did the Federal District

Court nonetheless commit clear error in finding that the petitioner was not discriminated against on account of his military duties?

9. If the court rules in favor of the petitioner with respect to any one or more of the legal questions presented above in "1" through "6," should the findings of fact made by the Federal District Court thereby become subject to more comprehensive review than is called for by Federal Rules of Civil Procedure 52(b)?

PARTIES TO THE PROCEEDINGS

Petitioner Gary D. Pignato, a licensed commercial pilot, was the appellant in the Court of Appeals and plaintiff in the District Court.

American Trans Air, a commercial airline company, was the appellee in the Court of Appeals and defendant in the District Court.

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STATUTES

38 U.S.C. Section 2021

38 U.S.C. Section 2022

38 U.S.C. Section 2024

Pub. L. 99-290, Section 1, 100 Stat. 413

LEGISLATIVE HISTORY

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3 (1966) . . . .

S. Rep. No. 1477, 90th Cong., 2d Sess.,
1-2 (1968) . . . .

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GARY D. PIGNATO,

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vs.

AMERICAN TRANS AIR, INC.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH DISTRICT

Petitioner Gary D. Pignato respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit filed January 19, 1994.

OPINION BELOW

The opinion below is reported at 14 F.3d 342 (7th Cir. 1994) and appears in the Appendix to this petition.

The opinion of the District Court Appears in the Appendix at pages 15 through 48.

JURISDICTION

Petitioner was the appellant in the Court of Appeals. The Seventh Circuit judgment was entered on January 19, 1994, affirming the District Court's Decision. This petition is filed within ninety days after the judgment of the Court of Appeals. This Court's jurisdiction is invoked under 28 U.S.C. Section 1254(1).

STATUTES

38 U.S.C. Section 2021 set forth in petition.
38 U.S.C. Section 2022 set forth in petition.
38 U.S.C. Section 2024 set forth in petition.
Pub. L. 99-290, Section 1, 100 Stat. 413

STATEMENT OF THE CASE

In April 1990, petitioner brought this civil action alleging, among other things, that his employer, American Trans Air (ATA), a commercial airline company, had failed to promote him in 1989 from B-727 copilot duties to B-757 duties on account of his status as a National Guardsman, thus violating sections 2021 and 2024 of Title 38 of the U.S. Code, better known as the Vietnam Veterans Readjustment Act (the "VRA").

In October of 1990, petitioner was promoted by ATA to B-757 status but in December of the same year he was fired. The complaint was thereafter amended to include petitioner's allegation that ATA's decision to terminate his employment also resulted from his military status. ATA asserts that the actions it took against petitioner resulted not from his reserve military obligations and the admitted scheduling disputes that arose in connection therewith but rather were ATA's legitimate response to petitioner's job performance. Specifically, with respect to ATA's not promoting petitioner in 1989, ATA alleges that petitioner lacked the necessary credentials; and with respect to ATA's 1990 discharge of petitioner, ATA alleges that on December 17th of that year, petitioner called in sick but was not in fact sick. (A 147-149)

At all relevant times, petitioner has been a fighter pilot in the Indiana National Guard, holding the rank of Captain. (A 48) As a flight engineer for ATA from 1986 to 1989, and later as a copilot or first officer from 1989 to 1990, petitioner, like his fellow crew members, made bids on a monthly basis for the upcoming month's ATA flights. Available for bid each month would be a series of lines, each line having a different combination of flight days, "reserve" days, "blank" days and days off or G-days. ATA would ultimately assign flight crew members a line, usually based on crew members' choices and their relative seniority. On "reserve" days, crew members were obligated to be on call; on blank days, a crew member was obligated to fly only if ATA reached him and notified him of a flight.

It was ATA's policy throughout the relevant time to require flight crew members with military reserve requirements to schedule military duties for G-days. (A 104-105, 118-119) Petitioner, although he scheduled almost 90% of his military training on G-days, (A 64-65), believed that under the VRA, he was entitled to leave without pay on some blank (or reserve) days in order to preserve a semblance of normal working life. Petitioner's occasional insistence on his rights as he perceived them led to a series of intense disputes culminating in this legal action. ATA, admitting to the military duty/civilian duty conflict, denies that any of the adverse personnel actions it carried out against petitioner were related to this protracted struggle.

The complaint also alleged that in April 1987, ATA had fired the petitioner on account of his military status and training obligations, with this earlier termination being reversed some few months later and petitioner reinstated in his then position of flight engineer. However, petitioner alleges that he and ATA never reached agreement on the question of backpay; thus, in addition to allegations concerning the 1989 non-promotion and the 1990 termination, the original complaint also made a claim for backpay arising out the brief 1987 termination. At trial, therefore, the District Court had before it allegations of three separate violations of 38 U.S.C. Sections 2021 and 2024: the 1987 termination, the 1989 non-promotion and the 1990 termination.

Prior to the trial before District Court Judge Hart of the Northern District of Illinois, several administrative agencies had become involved in petitioner's dispute with ATA. The U.S. Department of Labor, through its Office of Veterans' Employment and Training, played some role in seeking petitioner's reinstatement following the 1987 termination. However, when petitioner pressed his claim for backpay, the Department declined to assist him, finding that petitioner had not been reasonable in requesting military leaves of absence. The Department's decision was based on cases subsequently repudiated by this Court in King v. St. Vincent's Hospital, 112 St. Ct. 570 (1991).

The other pretrial administrative action related to this matter was the 1991 determination by the Illinois Employment Security Bureau that the petitioner's employment with ATA had been terminated for cause, disqualifying petitioner from being eligible for unemployment benefits.

After a three-day bench trial, Judge Hart ruled in favor of ATA. (A 15-48) On appeal to the U.S. Court of Appeals for the Seventh Circuit, the trial court's judgment was upheld. (A 1-14)

REASONS FOR GRANTING THE PETITION

1. Where, in connection with 38 U.S.C. sections 2021 and 2024 and related provisions governing the employment rights of veterans and reservists, Congress has

- made explicit and repeated declarations to the effect that these statutory provisions are vital to the national security,

- long maintained and consistently reinforced the substantive and procedural aspects of the rights in question, and

- provided extraordinary, virtually unique enforcement mechanisms benefiting protected reservists

are the lower federal courts free to narrowly construe the statutory provisions in question?

The Vietnam Veterans Readjustment Act and its predecessors are not the product of Congressional intent to integrate an embattled minority into the mainstream of American life. What Congress has had in mind in repeatedly enacting and re-enacting these laws is the national security and military readiness of the United States. (See "Reaffirmation of Recognition of National Guard and Reserve Forces," Pub.L. 99-290, section 1, 100 Stat. 413, quoted below.) The VRA and its predecessors enhance American security and readiness by assuring that a well-trained body of soldiers with high morale will always be ready to serve when called upon to do so.

Civilian employers, especially during recessionary times, and most especially when they are the kinds of companies hardest hit by recession, like airline companies, may be tempted to reduce costs by eliminating employees whose reserve obligations make them more costly to employ.

This potential conflict between national security and military preparedness needs, on the one hand, and private profit-seeking, on the other, has created the need for legislation like the VRA, legislation that very forcefully interferes with civilian employers' otherwise unfettered power to hire, fire and promote.

Without descending into bathos, petitioner also notes that, in addition to the vital Congressional concern with security and readiness, underlying these laws is a sense of gratitude for those who have served and sacrificed for America.

In 1986, Congress enacted as law the following "reaffirmation" of the VRA.

> **Reaffirmation of Recognition of National Guard and Reserve Forces**
>
> "(a) **Findings.**-The Congress reaffirms its findings....that
>
> "(1) the National Guard and Reserve forces of the United States are an integral part of the total force policy of the United States for national defense and need to be ready to respond, on short notice to aug-

ment the active military forces in time of national emergency;

"(2) attracting and retaining sufficient numbers of qualified persons to serve in the Guard and Reserve is a difficult challenge during a period in which there is a decreasing number of young people from which to recruit; and

"(3) the support of employers and supervisors in granting employees a leave of absence from their jobs to participate in military training without detriment to earned vacation time, promotions, and job benefits is essential to the maintenance of a strong Guard and Reserve force.

"(b) **Recognition of Members of Guard and Reserve.**-It continues to be the sense of Congress that the citizen-military volunteers who serve the Nation as members of the National Guard and Reserve require and deserve public recognition of the essential role they play in the national defense, and particularly require and deserve the support and cooperation of their civilian employers, in order to be fully ready to respond to national emergencies.

"(c) **Employer Support for Guard and Reserve.**-The Congress reaffirms its statements...that it-

"(1) recognizes, and requests all citizens to recognize, the vital need for a trained, ready National Guard and Reserve in the national defense posture of the United States; and

"(2) urges and requests employers and supervisors of employees who are members of the National Guard or Reserve to abide by the provisions of chapter 43 of title 38, United States Code [this chapter], by-

"(A) granting a leave of absence for military training, exclusive of earned vacation, to employees who

> are members of the Guard and Reserve; and
>
> "(B) providing such employees equal consideration for job benefits and promotions as all other employees."
>
> (emphasis added)

There is every reason to believe that Congress intended a broad and comprehensive system of protection for veterans and reservists. Both the explicit Congressional declarations contained in the quoted affirmation and the legislative history's continually noting the difficulties veterans and reservists have faced in employment* suggest that Congress meant to enact a law dealing with this whole set of problems in a broadly worded statute reinforced with the unique procedural tools contained in section 2022 thereof.

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* *See, e.g., H.R. Rep. No. 1303, 89th Cong., 2d Sess., 3(1966): "Employment practices which disadvantage employees with Reserve obligations have become an increasing problem in recent years." And to the same effect, see S. Rep. No. 1477, 90th Cong., 2d Sess., 1-2 (1968).*

Congress has re-enacted the laws protecting veterans and reservists several times in past decades, always expanding, and never contracting the scope of the rights in question here.

Sections 2021(b)(3), 2024(d) and the related enforcement section 2022, provide in relevant part as follows:

> "(3) Any person [holding or seeking a covered position] shall not be denied hiring, retention in employment, or any promotion or other incident or advantage of employment because of any obligation as a member of a Reserve component of the Armed Forces." (section 2021(b)(3))

"(d) Any [covered employee] shall upon request be granted a leave of absence by such person's employer for the period required to perform active duty for training or inactive duty training in the Armed Forces of the United States. Upon such employee's release from a period of such active duty for training or inactive duty training, such employee shall be permitted to return to such employee's position with such seniority, status, pay, and vacation as such employee would have had if such employee had not been absent for such purposes." (section 2024(d))

"If any employer, who is a private employer or a State or political subdivision thereof, fails or refuses to comply with the provisions of section 2021(a),(b)(1), or (b)(3), or 2024 of this title, the district court of the United States for any district in which such private employer maintains a place of business, or in which such State or political subdivision thereof exercises authority or carries out its functions, shall have the power, upon the filing of a motion, petition, or other appropriate pleading by the person entitled to the benefits of such provisions, specifically to require such employer to comply with such provisions and to compensate such person for any loss of wages or benefits suffered by reason of such employer's unlawful action. Any such compensation shall be in addition to and shall not be deemed to diminish any of the benefits provided for in such provisions. Upon application to the United States attorney or comparable official for any district in which such private employer maintains a place of business, or in which such State or political subdivision thereof exercises authority or carries out its functions, such United States attorney or official, if reasonably satisfied that the person so applying is entitled to such benefits, shall appear and act as attorney for such person in the amicable adjustment of the claim or in the filing of any motion, petition, or other appropriate pleading and the prosecution thereof specifically to require such employer to comply with such provisions. No fees or court costs shall be taxed against any person who may apply for such benenfits. In any such action only the employer shall be deemed a necessary respondent. No State statute of limitations shall apply to any proceedings under this chapter." (section 2022)

The language of sections 2021 and 2024 is broad and inclusive, calling upon the courts to apply these sections in furtherance of the broad national security, military readiness and fairness concerns declared by Congress to underlie them.

That Congress intended the VRA to have broad and deep effect is perhaps best illustrated by section 2022, providing a unique, direct access method of enforcement. Unlike, for example, the EEO laws, which engraft a complex round of confidential, preliminary administrative steps onto the underlying substantive rights, the VRA treats complainants much as if they were direct representatives of the Government, according them immediate, privileged access to any Federal District Court. They may call upon the U.S. Attorney to act as their attorney, and no State statute of limitations applies to any action brought under the VRA. These extraordinary privileges are self-evidently intended to enforce a broad and powerful statute rather than a tepid, employer-oriented specimen of compromise legislation.

Given all of these circumstances, to wit, the declared Congressional purposes, the history of these laws, their broad language and special enforcement rules, there is but little room for doubt that the underlying intent is that courts should, in giving life to the VRA, construe its terms broadly in favor of veterans and reservists.

Petitioner submits that the court below completely failed to give the relevant provisions of the VRA the requisite broad interpretation; rather, sections 2021 and 2024 were construed narrowly in favor of the employer:

- the courts below placed the burden of proof concerning discharge on the reservist-employee (A 7);

- the courts below ruled that harsh, wrong and irrational discharges of reservists are permissible under the VRA (A 13-14; A 46-47);

- the courts below decided that a private civilian airline can compel its reservist-pilots to confine their military duties to their days off (A 14, A 41-42);

- the courts below held that an adverse personnel action motivated in part by a reservist's military duties could be sustained under the VRA so long as some extrinsic cause, however slight, also motivated the employer's adverse action (A 12, 46-48); and

- the courts below held that a pilot-reservist under stress can reasonably be fired for taking a single sick day unless he discharges the burden of proving that, on the day in question, the stress amounted to a physically disabling condition (A 12, 46-48).

Permitted to stand, these rulings and the associated judicial gloss that the lower court has placed on the VRA will substantially defeat the intentions and purposes of Congress in enacting sections 2021, 2024 and related provisions of the VRA.

2. Is the ruling below consistent with earlier federal decisions interpreting the Vietnam Veterans Readjustment Act and its predecessors?

Petitioner submits that the decisions below substantially depart from this Court's unanimous decision in King v. St. Vincent's Hospital, 112 S. Ct. 570 (1991).

In King, a hospital employee requested, and was denied, a leave of absence for military duty under section 2024(d). The employer prevailed in the District Court and the Court of Appeals by arguing that the employee's projected three-year absence on military leave was so long as to be unreasonable and thus not within the protection of section 2024(d) of the VRA. The Court granted certiorari to settle a conflict among the circuits on the question whether a reasonableness test could be read into section 2024(d).

In a unanimous decision, the Court held that the plain language of section 2024(d), which contains no "reasonableness" or other limiting language, should control.

To a series of arguments advanced by the employer to show how inconvenient and impractical such lengthy leaves of absence are, the Court referred to the legislative intent underlying section 2024(d):

"....While this history [contained in several cited Congressional reports] may demonstrate that in 1960, section 2024(d) applied to short leaves, the significance of this is blunted by Congress' undoubted intention 20 years later to apply the subsection to long leaves when it brought [Active Guard/Reserve program] participants under section 2024(d)....The inference that Congress intended no such limits as the hospital espouses is buttressed by a joint House-Senate

Conference Committee's disapproval of a shift in the position taken by the Department of Labor on this issue. Before 1981 the Department took the position we adopt...After Lee v.Pensacola, 643 F.2d 866 (CA5 1981), the Department adopted the different view that section 2024(d) protection applied only to leaves of 90 days or less...Subsequently, a joint House-Senate Conference Committee Report announced that the House and Senate Veterans' Affairs Committee 'd[id] not believe that the 90-day limit [was] well founded either as legislative interpretation or application of the pertinent case[*] law.' " Ibid., pps.8-9, n.14 (brackets in original)

In the case at bar, both courts below expressed the opinion that petitioner's attempts to schedule some part of his military training on reserve or blank days, rather than always using his G-days for such training, was unreasonable and not protected by section 2024(d). However, under the clear holding in King that 2024(d) admits of no such limitation, petitioner was well within his rights in reqesting some leaves of abence for military duties on blank, reserve or even flight days.

King also teaches that, where there is a proper role for judicial interpretation in deciding a veteran's employment rights case, the operative principle is that laws extending benefits to servicemembers will be construed broadly in their favor.

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[*] *When the Department of Labor declined to assist petitioner in the case at bar (see page 7, supra) it did so under a theory like the one rejected in the House-Senate Conference Committee Report quoted by the Court in King.*

> "Even if [2024(b) was unclear], however we would ultimately read the provision in King's favor under the canon that provisions for benefits to members of the Armed Services are to be construed in the beneficiaries' favor. Fishgold v. Sullivan Drydock & Repair Corp., 328 U.S. 275, 285 (1946)." Ibid., p.6, n. 9

In the case at bar, petitioner submits that three legal questions arising in this case under section 2021(b)(3) are susceptible to the principle of statutory interpretation first enunciated in Fishgold v. Sullivan Drydock & Repair Co, and reaffirmed in King:

- a broad construction of section 2021(b)(3) would place on employers the burden of proving that an adverse personnel action taken against a reservist was not motivated by his or her military status, at least in cases where the reservist is discharged in the middle of a civil action challenging earlier alleged violations of the VRA;

- a broad interpretation of section 2021(b)(3) would not permit an employer to discharge a reservist for irrational, wrong or harsh reasons, at least where there is a proven history of disputes between the reservist and his employer about scheduling the reservist's military duties;

- a broad interpretation of section 2021(b)(3) would not permit an employer to base a reservist's termination, even in part, on his or her military status or duties.*

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* *In Carter v. U.S., 407 F.2d 1238 (DC Cir 1968), decided under a related, predecessor statute of the VRA, the court, also citing Fishgold, declined to endorse the FBI's*

Petitioner submits that the court below failed to take into account the ruling and supporting principles announced in the *King* case; and that had the court below followed *King*, it would have reached different conclusions about the case at bar.

While the court below did not take *King* into account, it made much of the 1980 Supreme Court decision in *Monroe v. Standard Oil Co.*, 452 U.S. 549, holding that a factory

*

(cont'd) termination of a returning veteran unless that agency first discharged the burden of proving that its action was reasonable and that the discharged employee had had actual notice that the conduct complained of by the FBI would constitute reason for termination. Petitioner believes that Carter v. U.S. comports well with the King decision, whereas the rulings challeged in this petition are based on ideas diametrically opposed to the teachings of King, Fishgold and Carter.

worker who had been duly granted military leaves of absence under section 2024(d) could not demand that his employer provide him with extra work to make up for the time lost while on leave.

In a 5-4 decision, with Chief Justice Burger writing the dissenting opinion, the Court held that section 2021(b)(3) of the VRA did not require employers to provide such make-up work. Two aspects of *Monroe* were relied upon below: (i) statements in *Monroe* that only employer conduct motivated *solely* by a reservist's military obligations is actionable under 2021 (b)(3) and (ii) the *Monroe* majority's view that the employee there sought a "special work schedule preference" outside the purview of section 2021(b)(3).

With respect to (i), since *Monroe* did not raise a question of mixed motives, the use of the word "solely" in passing cannot be taken as an actual ruling on that point. And, under *King*, limiting section 2021(b)(3) to exclude mixed motive discharges would be inconsistent with Congressional intent and the principle of broad interpretation for laws of this kind.

With respect to (ii), petitioner in the case at bar, unlike the appellant in Monroe, did not receive the leaves of absence from work time that he requested. ATA's policy was to limit such leaves to flyers' time off, or G-days. This case would be akin to Monroe on its facts only if petitioner had been permitted to take leaves on his flying or reserve/blank days and then demanded that, for those missed days of work, ATA schedule new flights for him. The facts in the case at bar do not bear comparison to those in Monroe.

In light of the unanimous decision in King, there is some doubt that the split decision in Monroe will continue to be a vital decision in the VRA field. Perhaps all that will survive of Monroe in the long run are the points made in his dissent by Chief

Justice Buger. For example, concerning the majority's view that the employee in Monroe was seeking a special scheduling preference, Chief Justice Burger stated:

> "The Court inaccurately characterizes petitioner's claim as seeking 'work-schedule preferences not available to other employees.'... [The employer's] policy is not to readjust the work schedule to accomodate absence for personal reasons, and petitioner alleges no right to special consideration regarding absences unrelated to military service. But if petitioner is to be placed on an equal footing with his co-workers, his military absences cannot be treated simply as personal leaves of absence. See Carlson v. New Hampshire Dep't of Safety, 609 F.2d 1024, 1027 (CA1 1979), cert. denied, 446 U.S. 913 (1980); Lott v. Goodyear Aerospace

Corp., 395 F. Supp. 866, 869-870 (ND Ohio 1975). A reservist's absence for training result from obligations vital to our national defense that other employees have not assumed, and the primary purpose of the reemployment rights statutes is to protect reservists against disadvantages in employment caused by these obligations. Indeed, the essence of the statutory guarantees provided by Congress is that employers must give special treatment to the military absences of veterans and reservists." Monroe, 452 U.S. 549, at p. 572.

3. Does the decision below transgress federal policy encouraging safety in commercial aviation by compelling airline pilots who are suffering from stress to conduct flights notwithstanding such stress?

The Supreme Court is free, under appropriate circumstances, to inquire into matters that are implicity raised in the record of a case although not raised squarely in the courts below. Grosso v. U.S., 390 U.S. 62, 71 (1968); Lear, Inc. v. Adkins, 395 U.S. 653, 662 n.10 (1968); Pipefitters Local Union v. U.S., 407 U.S. 385, 442 n.52 (1971); Youakim v. Miller, 425 U.S. 231 (1976); Vance v. Terrazas, 444 U.S. 252, 258-59 n.5 (1980); Carlson v. Green, 446 U.S. 14, 17 n.2 (1980); Ward v. Georgia, 450 U.S. 261, 265 n.5 (1981); Yee v. City of Escondido, Ca, ___ U.S. ___, 112 S.Ct 1522, 1531 (1992).

While the Supreme Court will not, generally speaking, entertain questions not raised earlier in state courts and certain kinds of administrative proceedings, see, e.g., Illinois v. Gates, 462 U.S. 213 (1983), the Court's discretion to do so in appeals from the federal courts is wide. If the record of a case necessarily presents an important federal question not raised or decided in the District Court or Court of Appeals but presented in the petition for certiorari, the Supreme Court should be free either to decide the question itself in appropriate circumstances or to remand the case for consideration in the lower courts. Petitioner submits that the question whether public policy favoring aviation safety has been compromised by ATA's actions in the case at bar is the kind of question this Court has discretion to return to the lower courts for consideration on the merits.

Of the cases cited above in support of this proposition, Carlson v. Green and Youakim v. Miller seem particularly in point. In Carlson, a prisoner had brought a Bivens-type suit alleging abuse by federal officials. After the prisoner died, the District Court and the Court of Appeals dealt with the question whether the plaintiff's claims survived his death. The question that was first raised in the petition for certiorari was whether Bivens claims could be maintained at all when an action on the same facts would lie under the Federal Tort Claims

Act. The Court ruled that, though not raised in either lower court, the question was one that it should decide.

In Youakim, a three-judge panel of District Court judges ruled that an Illinois law providing differing rates of compensation for different categories of foster parents did not violate the Equal Protection Clause of the U.S. Constitution. In their petition for certiorari, the appellants first raised the additional question whether, under the Supremacy Clause, the Illinois law was invalid as conflicting with the federal social security law.

The Supreme Court ruled that it would exercise its discretion to the extent of remanding the case to the District Court for consideration of the newly raised issue. 425 U.S. 231, p. 234.

Under the general principles informing this Court's discretionary power to control the adjudication of federal questions in the federal courts, it would be well within the

Court's power to remand the subject issue for further development below. If, as petitioner argues in the paragraphs directly below, significant airline safety questions permeate the case at bar, remand would be a beneficial exercise of the Court's discretion.

Essentially, and stating the relevant facts in the light most favorable to the employer, petitioner was fired because, in the opinion of ATA officials, petitioner's attendance at an office party on the evening of the same day that he claimed to be under too much stress to fly, proved that petitioner was able to perform his duties on the day in question and, hence, that he was not sick. ATA officials claimed to view this as an abuse of company sick leave policy justifying termination.

There was no dispute about, and ATA conceded, the marital stress then being experienced by the petitioner, the question being, was the stress acute enough to justify taking a sick day (A 147-150).

It is public knowledge that aviation accidents can and do sometimes result from cockpit crew members' stress (A 163-167). It should also be within judicial notice that marital discord like that being experienced at the relevant time by the petitioner may produce occasional extreme stress and anxiety.

Petitioner visited a therapist who confirmed symptoms of marital stress (A 119-122). That petitioner later attended a social function has been, in effect, held to constitute proof that he could have flown on the day in question.

Petitioner submits to the contrary that even persons who are not experts in aviation or psychology should realize that a flyer under stress and in a distracted state of mind ought not to undertake commercial aviation responsibilities but could benefit from attending a social event that might provide momentary diversion and therapy. In fact, the ATA official who made the decision to terminate petitioner testified that:

> "Q [by petitioner's attorney] Do you have an opinion as to whether or not it requires the same degree of concentration and responsibility to fly an airplane as it does to attend a Christmas party?
>
> "A I have an opinion that it does not take the same degree of mental capability to fly an airplane carrying passengers as it does to attend a social event." (A 140-141)

Thus, the important and judicially cognizable federal safety question arising implicitly in this case is whether the decision below will make it more difficult for commercial pilots and other cockpit crew members to relieve themselves of duty when they believe that, because of some transitory stress or other passing danger, they should not undertake commercial aviation responsibilities.

It is not difficult to imagine a pilot undergoing some kind of emotionally wrenching experience, who, like the petitioner, has had but one sick day in the year (A 141-143) and decides that what he needs to overcome the problem is a round of golf or set of tennis with a friend. By the decision below, however, this hypothetical pilot will conclude that his only alternative is to stay home, where the emotional distress may fester rather than subside.

Perhaps this pilot will decide to gamble: rather than stay home and suffer, he will take the chance that a day's flying will be itself therapeutic for him. Indeed, such a gamble could very well pay off for him. On the other hand, if the gamble turns out wrong, it is the flying public who will pay the heaviest price.

Petitioner submits that the decision below, if permitted to stand, will encourage pilots and flight engineers to make this kind of gamble, thereby measurably increasing the risk of airline accidents.

If ATA's strategy in dealing with the petitioner is any guide, it is probable that it will claim in response to this petition that, on the contrary, firing a copilot like petitioner, who they say "lied" about his health and socialized instead of going to work, promotes airline safety by penalizing irresponsible behavior. This kind of vilification appears to have greatly influenced the decision in the court below. Petitioner, however, can point to his lengthy, unblemished employment record and flying performance prior to the sick day in question; further, petitioner flew more than the average number of hours for ATA and took very few sick days or personal days in his career there (A 127-28, 141-44). These points, and other related questions of fact, are more fully discussed under "7" infra (clearly erroneous findings of fact), pages

49-51.

The only real issue between ATA and petitioner was his military obligations. Petitioner submits that his declining a flight on account of his poor emotional state on December 17, 1990 was a responsible, safety-enhancing act; and cannot be categorized, except unfairly, as irresponsible.

There is a national policy promoting the safe operation of commercial airlines. See, e.g., legislation establishing the National Transportation and Safety Board, 49 U.S.C. s.1902, Pub.L. 92-633, Title III, s.303 (1975). Given this important policy, the safety implications of the case at bar deserve to be fully aired on remand. If it were to be found, after trial and argument, that judicial endorsement of a termination like the one at bar unacceptably increases the risk of aviation accidents, it should be ruled that petitioners' termination was a wrongful discharge, violative of public policy embodied in the various aviation safety laws and regulations.

4. If a military reservist or Guardsman is discharged by his or her employer in part for alleged good cause and in part for scheduling problems arising from the reservist's military duties, does such a discharge violate 38 U.S.C. 2021 or 2024?

The court below stated that, under the decision in Monroe v. Standard Oil, an employee's military status must be the sole reason for his discharge to invoke the protection provided by the VRA. The court endorsed the view that if a discharge is based in part on a reservist's military obligations but is also based on some extrinsic cause, however slight, the VRA does not reach the case.

The court's factual determinations did not include a mixed-motive finding. However, as noted at pages 63-64 infra in the argument under question "9," if a court decides facts under an erroneous view of the applicable law, a reviewing court should give less weight to those findings than it ordinarily would.

The record clearly demonstrates that, virtually throughout his tenure at ATA, petitioner and management sparred on the issue of accomodating his military training with his civilian duties (A 48-67, 108-109, 118-119).

ATA exerted continous pressure on the petitioner to schedule military duty exclusively on his days off. Its goal was to impose the inconvenience of reservist membership wholly on the petitioner (A 104-106). ATA's offficial Tom Leonard testified that military duty was merely a "personal" requirement, i.e., in no way equivalent to official airline duty, id.

By implication, if not explicitly, the courts below adopted ATA's view that the VRA does not make military duty and private employment equivalent. The lower courts found that petitioner unreasonably took the position that the VRA made civilian and military duties functionally equivalent, to the extent that petitioner was entitled to discharge a portion of his military obligations on leave of absence from company time. (A 14)

If there is no express finding below that ATA was motivated in part by these scheduling issues, it can fairly be stated that the courts below would have endorsed ATA's action on that basis. Cf. Youakim v. Miller, 425 U.S. 231, 235 (1976).

Petitioner requests this Court to take the opportunity presented by the case at bar to make final and clear what Congress intended the VRA to do: prohibit an employer from taking adverse action against a reservist or Guardsman based, whether in whole or in part, on his or her performance of military duties.

To leave the lower court's decision standing would be to invite employers intent on cost-cutting, down-sizing and streamlining to engage in constant nitpicking and provocation in order to create circumstances like those in the instant case, artificial circumstances they hope will allow them to rid themselves of inconvenient reservists.

5. Is it proper construction of the Vietnam Veterans Readjustment Act, and consistent with the declared security and readiness concerns of the U.S. Congress, to hold that "irrational," "wrong," and "harsh" discharges of reservists are permissible under the Act?

The decision below expressly declares that "irrational"(A 13), "wrong,"(A 14) and "harsh" [*id.*] discharges of protected reservists do not violate the VRA. In the lower court's view, an employer's offer of an irrational purpose in firing a reservist can be accepted as credible and defeat any reservist's challenge under the VRA.

It simply does not give full force and effect to a law duly passed by Congress to articulate this unfortunate and ill-considered doctrine. The VRA is in danger of becoming a virtual dead letter if employers, intent on disposing of employees who will not take upon themselves the entire burden of reserve duty, can escape liability by resorting to less-than-rational, less-than-fair and just-plain-wrong reasons for such actions.

Under the standard enuciated below, a reservist or Guardsman like the petitioner here, who actually initiates a civil suit against his employer alleging failure-to-promote in violation of the VRA, will almost certainly become the subject of management's intensive search for just the "right," albeit irrational, harsh or wrong, "reason" for discharging him.

The Circuit court decision in Carter v. U.S., discussed more fully at pages 25-26, supra, under question "2," denied to employers this kind of abusable discretion; the Court of Appeals there was willing to read into a related predecessor statute restrictions on employers beyond the literal wording of the law, a judicial strategy completely at odds with that of the lower courts in the case at bar.

Have we now come so far from earlier periods of our history, with their security and preparedness concerns and their appreciation of military peronnel who fight our wars, that the courts are now ready and willing to give short shrift both to military people and to Congressional efforts to protect them?

Petitioner submits that a clear repudiation of the lower courts' endorsement of irrational, harsh, and wrong discharges for reservists is in order, if only so that the Supreme Court at least can be viewed as still respecting servicemembers' rights and the will of Congress.

6. When a commercial airline insists that its pilots and copilots use only their days off to engage in required military training, and refuses a reservist's request to perform

some of his military duties on so-called "reserve" or "blank" days, has the airline violated 38 U.S.C. section 2024 or 2021?

The plain words of section 2024 read even without the broad interpretation petitioner believes to be appropriate to the VRA, require that leaves of absence for military duty be granted on request. Petitioner, on several occasions, requested leaves of absence that fell on blank or reserve days; he was refused (A 49-54). Petitioner submits that ATA's conduct was a per se violation of section 2024(d).

The courts below, however, found that petitioner's occasionally bidding for schedules that conflicted with military assignments was an "intentional" breach of some unidentified obligation he had to his employer (A 41-43). Petitioner was excoriated in the courts below for doing something that section 2024(d) expressly permits him to do: request leaves of absence for military duty, at any time.

At the present time, despite the declared Congressional position that vacation time should not be absorbed in meeting a reservist's military obligations, see Congressional "Affirmation" quoted on page 9, supra, hundreds of pilots, copilots and flight engineers are probably under pressure from airlines to use their off-days for military training.

It is not hard to imagine that many, and possibly all, of the affected persons would rather not lose most of their weekend-like time to military training. However, as employees-at-will in difficult economic times, and with families to support, few if any of them are likely to assert their rights under the VRA. Petitioner has tried to do so, and his fate serves as a reminder to all those who, while asking for no more than what Congress intended to give them, might consider litigating with their employer.

Hence, the Court should seize this chance, presented by petitioner's courage and determination, to confirm and enforce the legislative intent embodied in the VRA, making it clear to reservists and their employers what rights reservists have and what the duties of their employers are in this respect.

Pilots and other cockpit crew members who are reservists or Guardsman must be entitled to the leisure and days off given to non-reservists. Reservists who call in sick a few days a year on a reasonable, discretionary basis should not have to fear management inquisitions into their exact physical condition and their exact whereabouts every hour of a sick day. Contrary to ATA's position, military duty should be held not to constitute a purely personal obligation but rather to constitute an obligation at least co-equal with the reservists civilian duties.

This dispute is essentially about whether the burdens and inconvenience of military reservists' duty should, or should not, fall wholly on the reservist. The Congressional intent is clear: employers, as citizens of a Republic with significant defense needs, must accommodate those who provide America with its military strength. If anyone puts the steel in a country's defenses, it must be fighter pilots like the petitioner, but ATA, rather than inconvenience itself by continuing to employ a fighter pilot who asserted VRA rights, has chosen instead to portray the petitioner, with a previously unblemished career, as liar and malingerer. This fearful example of character assassination, unfortunately endorsed by the court below, is the product of ATA's desire to prevail against petitioner at any price, perhaps to demonstrate to its other employees that the VRA gives them nothing but the right to fly for the reserves on their days off from work.

Petitioner submits that this Court's rejection of the decisions below will clear away remaining questions about the VRA and will duly effectuate the underlying Congressional intent to enhance national security and promote fair treatment of military personnel. Abstention, on the other hand, may promote further disrespect for the VRA and tend to embolden employers' attempts to lay the burden of military service wholly on servicemembers.

7. Are civil suits brought under the Vietnam Veterans Readjustment Act subject to the same rules governing burden of proof that apply in cases of employment discrimination brought under the civil rights provisions of federal law?

The courts below assumed without reflection that the usual rules on burden of proof governing the trial of civil rights cases apply with equal force to cases brought under the VRA. There are good reasons to believe otherwise.

As the decision in Carter v. U.S., discussed supra at page 26-27, demonstrates, effectively administering a law designed to enhance national security and promote fair treatment of veterans and reservists requires that the discharging employer be made to bear the burden of proving that its adverse action was free of taint. The record below is full of missing documents and witnesses (A 87-90, 96-102, 109-118, 122-127), potential evidence that, had the employer bore the burden of proof, would have been produced and would have made possible a more thorough and enlightened decision by the courts below.

For example, although indirect evidence was admitted in ATA's favor to establish the proposition that it employed many reservists with whom it allegedly had no scheduling problems, not a single one of these individuals, all presumably in the control of ATA, appeared to testify at the trial. Similarly, although challenged hearsay evidence of a most damaging nature was admitted to prove that petitioner had not done well on a copilots' proficiency check ride, no documentation was produced at the trial to confirm or disprove this key point, nor was the evaluator produced for testimony. However, since the petitioner was held to bear the burden of proof on these matters, ATA's failure to come forward with real evidence of its allegations did not jeopardize its case in any significant way.

Petitioner submits that this Court should consider, and rule favorably on, the proposition that in VRA cases the discharging employer ought to bear the evidentiary burden of justifying its discharge, particularly when a reservist is fired on questionable grounds in the very midst of litigating a claim that he was illegally denied promotion.

8. If the answer to "7" above is in the affirmative, and cases like the one at bar are in fact subject to the same burden-of-proof rules that apply to civil rights cases, did the Federal District Court nonetheless

commit clear error in finding that the petitioner was not discriminated against on account of his military status?

A trial court's findings of fact can be set aside if the reviewing court reaches the definite and firm conclusion that a mistake has been committed. United States v. U.S. Gypsum Co., 333 U.S. 364, 395 (1948).

With respect to the District Court's finding that petitioner's termination in 1990 was unrelated to his military status, and the Court of Appeals' affirmance, the following circumstances firmly demonstrate error in that finding:

I. It was uncontested throughout the trial that petitioner and ATA engaged in frequent disagreements concerning how petitioner would schedule his military training (A 48-54, 61-65, 108-109, 159-160);

II. The 1987 termination of petitioner's employment was expressly predicated on disagreements between ATA and petitioner about his military schedule (A 162);

III. Petitioner fulfilled almost 90% of his military duties on his G-days (A 64-65);

IV. Petitioner avoided bidding for schedules that would have created a conflict between his assigned flight days and his military duties, conflicts having been mostly between his military duty and blank or reserves days (A 64-65, 149-153);

V. In 1989, following petitioner's initial protest about his non-promotion, a so-called "three-tier" bidding sheet was given by ATA to petitioner alone, directing him as to how he should schedule his military and civilian commitments (A 159-161);

VI. Petitioner was undergoing the stress and strain of marital dissolution at the relevant time (A 67-70);

VII. ATA officials were aware of petitioner's stressful personal situation (A 129);

VIII. Prior to taking the sick day in question on December 17, 1990 petitioner had requested and taken few sick days during 1990 (A 141-144);

IX. The 1990 termination occurred in the midst of petitioner's earlier filed civil action alleging discriminatory termination in 1987 and discriminatory non-promotion in 89;

X. Steve Cooper, the ATA official who made the decision to fire petitioner, testified that:

> "...it does not take the same degree of mental capability to fly an airplane carrying passengers as it does to attend a social event." (A 140-141)

XI. Cooper testified to the effect that he would have accepted as justification for petitioner's sick day only such mental illness as would require FAA de-certification of petitioner's flight status (A 137-138, 154-155);

XII. Cooper testified that petitioner had had no other rules violations prior to December 17, 1990 (A 156-157, 142-144);

XIII. Cooper testified that, prior to making his termination decision, he did not know whether petitioner had used any other sick day in 1990 (A 156-157); following which testimony under cross examination, Cooper changed his testimony to state that petitioner had one sick day in either 1989 or 1990 (A 142-144);

XIV. Cooper testified that he did not know, when he terminated petitioner's employment in 1990, whether petitioner had taken any personal days in 1990 (A 142);

XV. It was established that ATA maintained a written progressive discipline policy, pursuant to which managers could give oral warnings for first offenses and then written reprimands and suspensions for subsequent violations before invoking the ultimate penalty of termination (A 157-158);

XVI. Cooper's testimony established that petitioner was advised by ATA management on the day in question to call in sick if he was under too much stress to fly (A 130, 146-147);

XVII. Petitioner sought and received psychological counseling for maritial stress on December 17, 1990 (A 152-154);

XVIII. Petitioner wished to continue counseling thereafter and requested additional no-fee therapy because he had lost his position with ATA (A 119-122);

XIX. At the December 31, 1990 meeting between petitioner and ATA management that culminated in petitioner's termination, he presented documentary evidence of the December 17th counseling and the associated condition of marital stress (A 133-135);

XX. Before the December 31, 1990 meeting that culminated in petitioner's termination, ATA management purchased the return air ticket it was required to give petitioner if

ATA were to make a termination decision (A 131-133);

XXI. ATA testified that it employed 30 or 40 other cockpit crew members who were also military reservists and had no scheduling problems with them (A 161); however, none of these other personnel appeared to testify nor was any list or other documentary evidence of their identities produced;

XXII. The evidence established that petitioner's actual flying time for ATA exceeded the company average (A 30);

XXIII. The court below stated that petitioner "took no further action regarding the 'stress' which kept him from working on December 17," (A 5), ignoring the uncontradicted statement of petitioner's counselor that, after petitioner lost his job, he asked to continue therapy on a no-fee basis but was turned down (A 121-122);

XXIV. The District Court found that petitioner had "misrepresented" his health on December 17, 1990 (A 47); however, no one denied, and the evidence is undisputed, that (a) petitioner was undergoing serious marital discord and stress at the relevant time, (b) that he reported this to the relevant ATA officials and (c) that the counselor whom petitioner visited confirmed, both at trial orally and in writing earlier, that petitioner was suffering from stress and anxiety related to his failing marriage and difficult family situation (A 119-122, 152-156).

Cumulatively, the foregoing points I through XXIV firmly establish that the District Court erred in finding that petitioner misrepresented his health on December 17, 1990, that ATA discharged him for that reason alone and that ATA did not take into account petitioner's military status and his VRA lawsuit when terminating him. The evidence is compelling that, had petitioner been an ATA copilot without military duties, without a pending lawsuit and without the courage to claim his VRA rights, that ATA would not have given a second thought to a single sick day asked for by a person under family stress.

The evidence tends to show that Steve Cooper believed he had set the following trap for petitioner: either petitioner would have to admit to mental illness disqualifying him from FAA medical certification or petitioner would have to admit being well enough to fly. In either case, ATA could then claim good cause for termination, which is why ATA had petitioner's return ticket in hand before the December 31, 1990 meeting.

The main problem with Cooper's trap is that it ignores a very large, obvious middle ground: a pilot or copilot might suffer transitory but extreme stress justifying temporary relief from flying duties (indeed, requiring relief from flying duties) but not rising to the level of mental illness. Death of a family member or friend, an impending trial (divorce, custodial rights, bankruptcy, etc.) and any number of other transitory, anxiety-producing events fall into this middle range. ATA officials ought to have known that crew members suffering these kinds of stresses, while not mentally ill, might not be able to safely operate commercial jetliners.

It is difficult for petitioner to understand why the courts below adopted ATA's view that no middle ground of high stress/no mental illness exists, but that is the posture this case is now in.

Petitioner requests the Court to hold that the District Court clearly erred in finding that ATA (i) did not terminate petitioner's employment in 1987 on account of his reserve status, (ii) did not fail to promote petitioner in 1989 on account of his military obligations and (iii) did not terminate petitioner's employment in 1990 on account of his position and duties as an Indiana National Guardsman.

9. Assuming (a) that this Court cannot find clear error in the fact findings below under Rule 52(b) but that (b) the Court does rule in favor of petitioner with respect to any one or more of the legal questions raised in "1" through "7" of this petition, would the rule apply that findings of fact made under a court's misinterpretation of the applicable law are subject to a stricter standard of review than that contained in Rule 52(b)?

This Court and other courts have held that factual determinations made by a District Court Judge after a bench trial conducted under misapprehensions of law cannot be accorded the same weight ordinarily due to a trial court's finding of fact. Inwood Laboratories, Inc. v. Ives Laboratories, Inc., 456 U.S. 844, 855 (1982). This principle has direct application to the case at bar.

In particular, the following interpretive holdings, implicit or explicit as the case may be, and which petitioner contends are erroneous, colored the fact-finding in this case:

- that reservists bear the burden of proving that their employer's adverse action was motivated by the reservist's military status;

- that unfair, irrational and wrong discharges of reservists do not violate the VRA;

- that an adverse personnel action based in part on a reservists' military duties and in part on other grounds is permissible under the VRA; and

- that reservists and Guardsmen can be compelled by their employers to use only their time off from civilian employment in discharging their military obligations.

There is good reason to believe that, had the courts below better understood the VRA and interpreted it in the broadly effectuating spirit appropriate to the statute, vastly different conclusions about the facts of this case may have been reached.

Thus, petitioner requests this Court to correct the lower court's misconceptions about the VRA and remand for a new trial conducted in accord with this Court's construction of the law.

Respectfully Submitted

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This petition was written by Joe Leibowitz of the New York bar. Mr. Leibowitz was until very recently living overseas for 13 years and could not arrange to be admitted to the Bar of this Court in time to submit this petition. However, if the writ is granted, Mr. Leibowitz will duly seek admission and thereafter appear as petitioner's counsel.

APPENDIX

In the

United States Court of Appeals

For the Seventh Circuit

No. 92-3685

GARY D. PIGNATO,

Plaintiff-Appellant,

v.

AMERICAN TRANS AIR, INC.,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 90 C 2012—**William T. Hart**, *Judge*.

ARGUED SEPTEMBER 13, 1993—DECIDED JANUARY 19, 1994

Before POSNER, *Chief Judge*, CUDAHY and KANNE, *Circuit Judges.*

KANNE, *Circuit Judge*. American Trans Air (ATA) is an air carrier which operates both charter flights and scheduled passenger service. Gary Pignato was an employee of ATA from December, 1985 to December 1990. Throughout the period of his employment with ATA, Pignato was also a member of the Indiana Air National Guard.

Pignato contends that ATA acted against him illegally in three ways: (1) by firing him in 1987; (2) by denying him an "upgrade" to a better job in 1989; and (3) by firing him again, and finally, in 1990. Pignato bases his claims against ATA on two statutory provisions of the Vietnam Veterans Readjustment Act.[1]

I. Facts

ATA operates several B-727 aircraft, which make a total of approximately 400 flights per month. Each B-727 has a crew of three; a captain, a first officer,[2] and a flight engineer. Pignato was hired in 1985 as a B-727 flight engineer. In January of 1989 he was promoted to B-727 copilot.

Flight assignments for B-727 crew members are made by a bidding process, which is repeated each month. On or about the fifteenth of the month each crew member is given a "crew bid sheet" which contains eight to ten "lines" to choose from. A line is a monthly schedule of days when the employee will be required to fly, days where he must be available to fly if needed, and other days on which he might be called on to fly, and several guaranteed days off. These guaranteed days off are called "G-days."

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[1] 38 U.S.C. Section 2021(b)(3) provides:

> Any person who seeks or holds a position [in private employment] shall not be denied hiring, retention in employment, or any promotion or other incident or advantage of employment because of any obligation as a member of a reserve component of the Armed Forces.

38 U.S.C. Section 2024(d) provides:

> Any [military reservist] shall upon request be granted a leave of absence by such person's employer for the period required to perform active duty for training or inactive duty training in the Armed Forces of the United States. Upon such employee's release from a period of inactive duty training . . ., such employee shall be permitted to return to such employee's position with such seniority, status, pay, and vacation as such employee would have had if such employee had not been absent for such purposes.

[2] To be consistent with the parties' characterizations in their briefs, we use the term "copilot" rather than "first officer" throughout the remainder of this opinion.

Crew members submit a list of lines in order of preference. Lines are assigned by seniority. If, for example, two copilots listed the same line as their first choice, the more senior copilot would be awarded the line.

Pignato had to accommodate his flying schedule for ATA with his commitment to the Guard. The Guard's training requirements included, typically, Unit Training Assemblies (UTAs) one weekend per month, annual 15 day training periods, and 48 four hour training periods. In Pignato's case, his Guard commitment was usually four or five days per month. The Guard notifies its members twelve to eighteen months in advance of the date of the annual training period. Each summer it publishes the dates for UTAs for the following calendar year. The four hour training periods may be scheduled at virtually any time. Pignato always had many months of advance notice, or great flexibility, as to his Guard flying schedule.

ATA requires its employees who are members of the Guard to perform their military obligations on their G-days. They are required to bid for lines which do not conflict with training commitments. As we have noted, Guard commitments are announced many months in advance. If there is an unavoidable conflict, the employee is to notify ATA as soon as he is aware of a conflict.

Pignato's situation was not unique. Many ATA aircrew are members of Air Force Reserve units. Very few of these individuals have found it difficult to comply with ATA's rules. Conflicts between the two schedules rarely arise.

Nonetheless, on numerous occasions Pignato bid for lines which conflicted with his military obligations. He then informed ATA of conflicts long after he first became aware of them. Pignato apparently believed that ATA had to allow him to fly for the Guard, and could impose no requirements on him to accommodate this service with his work requirements. In particular, he did not want to use his personal time to fly for the Guard. He wanted his Guard flying time to come out of time he would otherwise be flying for ATA.

Pignato's unwillingness to notify ATA of his Guard flying commitments in advance forced ATA, on several occasions, to find a replacement crew member at the last minute. Pignato was repeatedly warned to comply with ATA's policy regarding scheduling.

On April 15, 1987 ATA fired Pignato because he bid for a line with two known conflicts, in violation of ATA's flight scheduling policies. Pignato responded by filing a complaint with the Department of Labor alleging that ATA had terminated him because of his military status, and demanding reinstatement and backpay. Pignato's claim was found to be meritless. ATA rehired Pignato several months later, amending his file to indicate that the period of his termination was a leave of absence without pay.

In January of 1989 Pignato was promoted to B-727 copilot. In October of that year he asked to be assigned to a class to be trained as a copilot on the B-757, a new airplane which ATA was adding to its fleet. An "upgrade" to copilot on the newer B-757 would have included about a fifteen percent increase in Pignato's pay.

In April of 1990 Pignato filed a *pro se* complaint against ATA for, among other things, failing to train him as a B-757 copilot. In October of 1990, ATA assigned Pignato to a training class for the B-757. Pignato was scheduled to complete his training as a B-757 copilot on December 17, 1990. His final requirement was to fly as an observer on a B-757 that day. Pignato did not make the flight.

Pignato called ATA twice that day. During his first phone call Pignato asked to be relieved of his flight duty for the day. He offered three reasons for his request: (1) that he was "stressed out" due to his ongoing divorce proceedings, (2) that there was a second pilot scheduled to receive training on the same flight, so that his presence would be redundant, and (3) that he wanted to attend the ATA Christmas party. His request was denied.

Pignato then called a second time. He said that he was sick, claiming that he was under too much stress to fly. That same day Pignato got a note from a social worker, Mark Frey, which indicated that Pignato was being counselled by him. The note did not indicate that Pignato was unable to perform his duties.

Despite Pignato's alleged stress, he was able to relax sufficiently by that evening to attend the ATA Christmas party. He stayed at the party until midnight. He got drunk. When the party ended Pignato was too drunk to drive, so he went in an other person's car to the home of three female ATA employees. There the festivities continued for the remainder of the night. Pignato returned home the next day, and despite the celebratory exertions of the previous evening and early morning, Pignato called in to ATA that he was now "well."

Pignato's "stress" had apparently subsided by December 20 and 21, because he flew for the Guard on those dates. He took no further action regarding the "stress" which kept him from working on December 17.

ATA requested Pignato's appearance at company headquarters on December 31, 1990. He met with representatives of the company, who terminated him. The reasons given for his termination were "abuse of the sick day policy, representing manipulation of the scheduling system for personal convenience."

Captain Cooper, Pignato's superior at ATA, attended the December 31 meeting. During the meeting he made the decision to terminate Pignato. Cooper found the letter from Mark Frey to be irrelevant to his decision because it did not state that Pignato was incapable of performing his duties. Furthermore, at the December 31 meeting, Cooper claims that Pignato himself stated that he was capable of performing his duties on December 18. Pignato had used a "sick" day to excuse himself from working when he was not, in fact, sick. This was a violation of ATA's policy.

ATA had a policy of "progressive discipline" which generally required penalties of increasing severity for repeated misconduct. Termination is, of course, the ultimate sanction for an unsatisfactory employee. However, Cooper characterized Pignato's actions as "an episode of gross misconduct" and "a serious demonstration of irresponsible behavior." Because he found Pignato's offense to be so serious, Cooper did not first impose a lesser sanction, but fired him on the spot.

Pignato filed a claim with the Illinois Department of Employment Security. A hearing was held before a referee on February 14, 1991, at which both Pignato and ATA testified. The referee found that Pignato had abused ATA's sick leave policy, and upheld ATA's termination of Pignato. The Employment Security Review Board upheld this decision on July 18, 1991.

Pignato then filed a *pro se* action against ATA in federal court. In September 1991 the district court denied ATA's motion for summary judgment, finding that there were contested issues of fact regarding the 1987 termination. Pignato then retained counsel, who took the case to trial. After a three day bench trial the trial court found for ATA on all counts.

Pignato filed a timely notice of appeal. This court has jurisdiction under 28 U.S.C. § 1291.

II. Standard of Review

Pignato claims that ATA discriminated against him because of his military reserve status. The district court found to the contrary. We have held that "a finding of intentional discrimination is a finding of fact." *Tyson v. Jones & Laughlin Steel Corp.*, 958 F.2d 756 (7th Cir. 1992) (quoting *Anderson v. City of Bessemer City*, 470 U.S. 564, 573, 105 S. Ct. 1504, 1511, 84 L.Ed.2d 518 (1985)). Therefore, the appropriate standard of review is clear error. *Id.*, Fed. R.Civ.P. 52(a). We find a clear error when we are left "with a definite and firm conviction that a mistake has been made." *Id.* When applying this standard we recognize the discretion which the trial judge must have to weigh testimony and other evidence, and to determine which version of the facts is correct. *Id. See also Yowell* *v. United States Postal Serv.*, 810 F.2d 644, 648 (7th Cir. 1987).

III. Analysis

In *Yowell* we discussed the rules governing burden of proof, burdens of production and the sequence of proof which has been developed for Title VII cases. In *Visser v. Packer Eng'g Assocs., Inc.*, 924 F.2d 655, 657 (7th Cir. 1991) we extended the methodology of Title VII discrimination cases to cover age discrimination. Cases involving discrimination against a class of persons protected by a different statute, as in this case a military reservist protected by the Vietnam Era Veterans Recovery Act, must follow essentially the same steps.

The plaintiff bears the burden of proof throughout the case. First, plaintiff must establish his prima facie case of intentional discrimination by offering evidence to raise an inference that the plaintiff was discharged, or otherwise mistreated, because he belonged to a protected group. Second, once plaintiff has established a prima facie case, the burden of production shifts to the defendant to "articulate a legitimate nondiscriminatory reason for the employee's removal." Third, plaintiff then has the opportunity to demonstrate that the defendant's articulated reason for terminating him is "a mere pretext for discrimination." This demonstration "merges with [plaintiff's] ultimate burden of showing that the defendant intentionally discriminated against the plaintiff." *Id.* at 647.

The district court, in its Memorandum Opinion and Order of September 26, 1991 denied ATA's motion for summary judgment, finding that there were genuine issues of fact as to whether ATA "discharged or otherwise disadvantaged" Pignato solely because of his military obligations. We have held that where a case has survived a motion to dismiss or for summary judgment, and has been fully tried on the merits, that the "reviewing court should [not] concentrate on the issue of whether the plaintiff has established a prima facie case." *Andre v. Bendix Corp.*, 774 F.2d 786, 792 (7th Cir. 1985), (citing *U.S. Postal Serv. v. Aikens*, 460 U.S. 711, 714-15, 103 S. Ct. 1478, 1481 (1983)). Therefore, despite certain apparent weaknesses revealed by the record in Pignato's prima facie case we leave without further comment the district court's finding that he had established it.

We must now examine the next two steps in an employment discrimination case: ATA's proffered reasons for its alleged mistreatment of Pignato, and Pignato's attempt to demonstrate that those reasons are not true but are pretexts for discrimination.[3]

There were three distinct job actions by ATA which Pignato claims were discriminatory. First, Pignato claims that he should have received back pay for the period during which he was fired in 1987. Second, Pignato claims that ATA refused to "upgrade" him due to his Guard commitment. Third, Pignato claims that ATA fired him in December 1990 because of his Guard commitment.

The district court found against Pignato, and we will only reverse if we find clear error. We will not reweigh the credibility of witnesses, *Smith v. BMI, Inc.*, 957 F.2d 462, 463 (7th Cir. 1992), or find clear error where the district court drew one of several possible inferences from the evidence before it. *Tyson v. Jones*, 958 F.2d 756, 760 (7th Cir. 1992). We will examine each of the challenged actions separately, in the order they occurred.

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[3] The Supreme Court recently addressed the standard of proof plaintiffs must meet to prevail in employment discrimination claims, once they have cleared the hurdle of putting on a prima facie case. *St. Mary's Honor Center v. Hicks*, ___ U.S. ___, 113 S. Ct. 2742 (1993). *St. Mary's* holds that plaintiff does not prevail as a matter of law merely by showing that the employers stated reason for its action was false.

In this case, Pignato failed to rebut ATA's explanation for its actions, so we do not reach the issue implicated by *St. Mary's*. We fully discuss this issue in our recent opinion, *Anderson v. Baxter Health Care Corp.*, No. 92-3482 (7th Cir. Jan. 11, 1994).

The 1987 Termination

Pignato claims that he should have received back pay for the period during which he was fired in 1987. The district court found that Pignato had settled his claim against ATA, and therefore could not re-raise it.

Pignato's 1987 claim against ATA sought back pay. However, ATA's offer of reinstatement excluded back pay, but modified his employment record to indicate that he was on unpaid leave, not terminated. Pignato returned to work following this offer.

Pignato claimed that he had never accepted reemployment without back pay. ATA offered evidence that Pignato *had* accepted reemployment without back pay.

The district concluded that Pignato knew what ATA's offer was, and accepted it by returning to work. The evidence in the record more than adequately supports the district court's conclusion that Pignato accepted ATA's settlement offer. Pignato has settled any claims arising from the 1987 termination and may not raise them now.

We find no error on this issue.

The Denial of a Job Upgrade

In October 1989, Pignato asked to be assigned to a pilot-training class for ATA's new B-757 aircraft. Pignato claims that ATA initially denied his request for an upgrade to B-757 copilot because of his reserve status. ATA claimed that Pignato was not initially upgraded because it believed that he needed more training and flight experience, that he had only recently been promoted to B-727 copilot, and that other more experienced personnel were better candidates. The district court concluded that ATA's decision not to upgrade Pignato until one year after his initial request was not based on his reserve status.

Pignato and ATA disagree about the facts pertaining to ATA's denial of the upgrade. For example, Pignato's proficiency as a pilot was assessed in a "check ride" in

November of 1989. He was observed by an ATA employee, Captain Leonard. Leonard testified that Pignato's performance was below average. Pignato claims that he was told at the time that his check ride was satisfactory.

Later that same month, Pignato met with an ATA supervisor to discuss his ongoing military leave dispute with ATA. Pignato claims that he was "outraged and surprised" to later learn that ATA considered his performance on the check ride to be unsatisfactory. Pignato claims that the written report he had been shown after the check ride had been falsified. He claims that this change was made by ATA to penalize him for continuing to argue against ATA's policy on scheduling Guard flying commitments.

At trial Pignato offered only his own, uncorroborated testimony that the document had been changed, and that he had previously been unaware that ATA had considered his check flight to be unsatisfactory.

Not only do the parties disagree on what actually happened during the November 1989 check ride. They also disagree on its significance. Pignato constructs an argument which goes roughly as follows: (1) ATA claimed that it relied on the November 1989 check flight when denying him the upgrade, but that (2) it had already denied him the upgrade before the flight, so (3) ATA lied about its motive, so (4) its true motive must have been discrimination against Pignato because of his military status.

However, the first link in the chain won't hold. ATA's testimony is that it did *not* rely on the 1989 check ride. ATA admits that it denied Pignato the upgrade *before* the flight. ATA's explanation is that it denied the upgrade because of Pignato's lack of experience relative to the other pilots who applied for the upgrade. Once Pignato's misstatement of the record is corrected, this argument dissolves.

Pignato also tries to show ATA personnel without Guard commitments were unfairly favored. He points out that two other relatively inexperienced pilots, Kaiser and Ledray, were upgraded before he was. He asserts that this is evidence of discrimination. ATA gave credible reasons why each of them was upgraded before Pignato. Kaiser had been with ATA longer, had more experience than Pignato, and had certain relevant special expertise. Ledray had an "unblemished" flight record. Though he had about the same level of experience as Pignato, he was allowed to enter the program before Pignato. Only one inexperienced pilot was allowed in at a time. When Ledray's group completed their training, Pignato was upgraded.

On the issue of denial of an upgrade, the trial court was faced with rival explanations for the same set of facts. It had to decide whose story it was to believe. This was a bench trial. There were many witnesses, and full opportunity for direct and cross-examination. At the end of the day, the district court believed one set of witnesses, and not the other. It heard them testify, and it assessed their credibility. It concluded that ATA's explanation for its conduct was not a pretext for discrimination.

Pignato's challenge to this finding is based primarily on citations to his own testimony, which is contradicted by the testimony of witnesses for ATA. In *Tyson v. Jones*, 958 F.2d 756, 760 (7th Cir. 1992), we stated that when the appellant asked us to "redetermine the credibility of the [employer's] witnesses, and presumably his own" he was "asking us to do precisely that which we may not." *Id.* Pignato, too, is asking us to do what we may not do.

We cannot find clear error on this issue. We uphold the district court's finding that ATA's initial refusal to upgrade Pignato was not discriminatory.

The 1990 Termination

We have already set out the facts surrounding Pignato's final termination, above. From these facts he constructs an argument that he is a victim of employment discrimination. Pignato's argument, briefly, is this: (1) There was an ongoing dispute between Pignato and ATA regarding his flying schedule for the Guard. (2) No rational employer would have fired Pignato for his conduct on December 17, 1992. So, (3) ATA must be lying about its reason for firing him—and (4) therefore its real reason must be its dispute about his Guard flying schedule. And finally, (5) being fired because of a disputed Guard flying schedule is a form of illegal employment discrimination.

Pignato demonstrated that at the time he was fired there was an ongoing disagreement between ATA and himself about reconciling his Guard flying schedule with his job schedule. The existence of this ongoing problem is undisputed.

Pignato then attempted to demonstrate that ATA cannot be taken seriously when it claims it fired him because of his conduct on December 17, 1990. He argues that firing him for the reasons ATA stated would be irrational. He asks, "[w]hat rational employer fires a five year veteran employee, highly trained, at considerable expense, who had no prior disciplinary infractions, for taking a sick day that was supported by a doctors note?"

Of course, Pignato did not really "take a sick day." He was not sick, he could have flown if he wanted to, and he violated ATA's rules for "taking a sick day." Nor did he have a "doctor's note." He had a note from a social worker which did not even say he was unable to work. As to being a veteran employee, and expensively trained, a reasonable employer might expect such a valued employee to act like a highly trained professional with serious responsibilities. A rational employer might very well fire an employee who refused to show up for work when he was scheduled to work, who thereby caused inconvenience and expense to other employees and the company, who then made up an excuse for his absence, and who flaunted his lack of responsibility by getting drunk at the firm Christmas party when he was supposedly too sick to work.

It was simply not clear error for the district court to conclude that ATA's motivation for firing Pignato was

Pignato's own irresponsible conduct, whatever his military status.

However, even if we were to conclude that ATA's decision to fire Pignato was "irrational" this would not make it a "pretext." If ATA's actual motivation was what they say it was, irrational or not, it is not a pretext.

It is not enough for the plaintiff to show that a reason given for a job action is not just, or fair, or sensible. *Mister v. Illinois Cent. Gulf R.R. Co.*, 832 F.2d 1427, 1435 (7th Cir. 1987) ("The employer need not have 'good' reasons, and a mistaken business decision is not on that account a 'pretext'."). He must show that the explanation given is "a phony reason." If the plaintiff shows that the reason given is *not true*, then he has shown pretext. Having done so, the trier of fact is allowed to infer that the falsehood was meant to conceal illegal job discrimination. *Anderson v. Baxter*, ____ F.3d ____ (7th Cir. 1993), *Visser v. Packer Eng'g Assocs.*, 924 F.2d 655 (7th Cir. 1991).

Pignato failed to prove that ATA's explanation for its decision to terminate, him was pretextual. Therefore, no inference of discrimination is allowed. The district court's finding that ATA's explanation was true, i.e. not pretextual, was not clear error.

Furthermore, even if ATA's decision was in some part influenced by their ongoing difficulties with Pignato's schedule, this would in no way help his cause. "[T]he mere existence of mixed motives—one permissible, one forbidden—is not enough to establish liability. The forbidden motive, [military status] in this case, must be a sufficient condition, or but-for cause, of the employee's termination." *Visser*, 924 F.2d at 658. Pignato, failed to prove that ATA's proffered reason for his termination was pretextual. ATA's explanation was therefore found to be, if not the sole reason, at minimum a significant motivation for his firing. Therefore any influence his ongoing job dispute may have had on the decision was not a "but-for cause."

Finally, Pignato's unwillingness to comply with ATA's policy regarding military flight commitments, even if it was in any part a basis for his termination, is distinct from his military status itself, and not protected by law. The Supreme Court interpreted the statute upon which Pignato has brought this case in *Monroe v. Standard Oil Co.*, 452 U.S. 561, 101 S. Ct. 2510, 2517 (1981). The Supreme Court held that the statute did not "impos[e] an obligation on employers to provide a special work scheduling preference" for reservists. Rather, "the legislation stated explicitly that reservists were to be entitled 'to the same treatment afforded their co-workers not having such military obligations. . . .'" *Id.*

Pignato was seeking a "special work scheduling preference" not only different from his non-military coworkers, but from his military coworkers as well. Many ATA employees fly for the Guard. They, apparently, manage to combine that service with their work for ATA.

At bottom, what Pignato wanted was for any and all inconveniences of his Guard service to fall on ATA, and none on himself. But this is not what the law, as set forth in *Monroe*, requires. Pignato has no right to any such special treatment.

It was not clear error for the district court to reject Pignato's claim that his final termination by ATA was a result of his reserve status. As the district court correctly stated, "[w]hether ATA's judgment of Pignato's conduct was right, wrong, or harsh is not the test. It was not pretextual."

AFFIRMED.

A true Copy:
Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

USCA AO7XXXC-92-001—Midwest Law Printing Co., Inc., Chicago—1-19-94

UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF ILLINOIS

Name of Assigned Judge: WILLIAM T. HART

Case Number: 90 C 2012

Date: Oct. 15, 1992

Case Title: GARY D. PIGNATO v. AMERICAN TRANS AIR

DOCKET ENTRY:

☒ [Other docket entry]

Enter Findings of Fact, Conclusions of Law, and Order. The Clerk of the Court shall enter a judgment on the merits in favor of the defendant American Trans Air and against the plaintiff Gary D. Pignato dismissing plaintiff's cause of action with prejudice.

☒ [For further detail see] ☒ order attached to the original minute order form.

☒ Notices mail by judge's staff.

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

GARY D. PIGNATO)
)
Plaintiff,)
v.) No. 90 C 2012
)
AMERICAN TRANS AIR)
)
Defendant.)

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

I. INTRODUCTION

This matter is before the court after a bench trial for entry of findings of fact and conclusions of law. Plaintiff Gary D. Pignato is a member of the Indiana Air National Guard (the "Guard"). He alleges that defendant American Trans Air ("ATA") discharged and refused to promote him because of his obligations as a member of a Reserve component of the Armed Forces in violation of the Vietnam Veterans' Readjustment Assistance Act, 38 U.S.C. section 2021 (b)(3), which provides that no member of a Reserve component shall be denied "retention in employment, or any promotions, because of any obligation as a member of a Reserve Component."

Plaintiff originally filed this action _pro se_ claiming (1) backpay for a period of termination from April 17, 1987 through June 30, 1987 and (2) damages for failing to promote him in October of 1989 or early 1990. Thereafter, on December 31, 1990, plaintiff was discharged by defendant on the ground that he took sick leave which was not authorized. This termination then became the third ground upon which relief was sought.

On September 26, 1991, while plaintiff was still proceeding _pro se_, the court denied defendant's motion for summary judgement finding that there were contested issues of fact with respect to what occured at the time of the 1987 termination. Shortly thereafter, plaintiff retained counsel.

The parties agree that the essential issue in the case is whether defendant's conduct in terminating plaintiff in 1987, again in 1990, and not promoting him, was a pretext for discriminating against him because of his conflicting training obligations in the Guard.

II. FINDINGS OF FACT

A.

The court adopts as findings of fact, the following "Agreed Statement of Uncontested Facts" set forth in the Final Pretrial Order:

1. Plaintiff, a resident of Elk Grove Village, Illinois, was an employee of ATA from December 1985 through December 31, 1990. He was hired as a Boeing 727 ("B-727") Flight Engineer. In January, 1989, he was promoted to B-727 copilot. In October, 1990, he began

training for the position of B-727 First Officer.

2. Defendant ATA is a United States certified air carrier which performs domestic and international charter operations and scheduled passenger services. It offers charter services in Chicago, Illinois, among other places.

3. Pignato's action is based upon alleged violations of the Vietnam Era Veterans' Readjustment Act, 38 U.S.C. section 2021, et seq. This court has jurisdiction pursuant to 28 U.S.C. section 2022 and 28 U.S.C. section 1331. Venue in this court is appropriate under 28 U.S.C. sections 1391 (b) & (c).

4. The ATA fleet consists of several aircraft, including B-727's. A B-727 is manned by a cockpit crew of three -- a captain (pilot), a first officer (copilot), and a

flight engineer. During Pignato's employment at ATA, B-727 crew members were "based" at three locations: Indianapolis, Chicago, and Detroit. Pignato was based in Chicago.

5. Each month, ATA's B-727 aircraft fly about 400 flights. In setting crews for these flights, ATA allows each crew member to "bid" for his flight schedule. ATA initiates the bidding process by publishing on or about the 15th of each month a "Crew Bid Sheet" which includes the following month's flight schedule. Crew members bid for an entire 30-day schedule. They cannot bid for individual flights. The bid schedule for Chicago-based crew members normally includes eight to ten "lines" (30-day schedules) from which to choose.

6. Each line normally consists of (1) ten to fifteen days on which the crew member must actuallly fly a scheduled flight, (2) zero to four "reserve days" on which the crew

member must be on call, (3) six to eight "blank days" on which the crew member has no scheduled flight commitment but is subject to assignment if ATA can contact him, and (4) eight or nine guaranteed days off ("G-days") on which the crew member is free of all duty.

7. Each crew member submits a bid which list the lines he wants in order of preference. A crew member bids against other crew members within his classification based in the same city. Thus, while Pignato was a flight engineer based in Chicago, he bid against other flight engineers based in Chicago and while Pignato was a B-727 copilot based in Chicago, he bid against other B-727 copilots based in Chicago. Length of service (seniority) with ATA generally governs the bid awards. If two copilots list the same line as their first choice, the more senior copilot generally is awarded the line.

8. Pignato is a pilot in the Guard. His military training requirements consist of (1) Unit Training Assemblies ("UTAs"), normally consisting of one 15-day training period per year, and (3) 48 4-hour Additional Flying Proficiency Training ("AFPT") periods. Pignato normally performs military four or five days each month.

9. The Guard schedules this training in the following manner:

A. UTAs - in July or August of each year the Guard publishes an Order which lists the dates for each of the UTAs scheduled for the following calender year.

B. Annual Tours - The Guard normally notifies unit members verbally twelve to eighteen months in advance, followed by a written notification.

C. AFPT period - Each month (normally on the 20th) the Guard mails a schedule of available flights for the following month to each crew member. The guard normally flies on about 23 days each week, every Thursday night, and, when UTA weekends occur, from the preceeding Tuesday through the following Saturday). The crew member then tells the Guard which flights he wants. Pignato normally does not notify the Guard until 24 to 48 hours prior to the flight he wants. He can schedule his AFPT periods "just about any time he wants."

10. Allegedly due to Pignato's abuse of flight scheduling policies, ATA terminated Pignato in April, 1987.

11. Pignato filed a complaint with the United States Department of Labor alleging ATA illegally terminated him because of his military status. He sought reinstatement and the same $6,619.75 in back pay he seeks in the

case at bar. He also wanted the Department of Justice to represent him, pursuant to 38 U.S.C. section 2022, in an attempt to obtain a ruling that he need not use his G-days to perform his military obligations. Both agencies concluded that his claims lacked merit.

12. On July 1, 1987, Pignato returned to work pursuant to ATA's June 1 offer of reemployment. ATA changed Pignato's personnel records which had reflected his termination on April 7, 1987, to reflect that he was on a unpaid leave of absence from April 17 through June 30, 1987.

13. In October, 1989, ten months subsequent to his promotion to B-727 copilot, Pignato requested that he be assigned to the newly initiated class for an upgrade to the position of B-757 copilot, a position which pays 15% more. At the time, decisions as to which crew members would be placed in B-757 upgrade training were made by Chief Pilot

Stephen J. Cooper. ATA later placed Pignato in upgrade training in October 1990.

14. On April 6, 1990, Pignato filed a pro se Complaint alleging, among other things, ATA's failure to train him on the B-757.

15. In October, 1990, ATA assigned Pignato to a B-757 training class.

16. On December 17, 1990, Pignato was scheduled to fly on a B-757 flight to complete his training. Pignato was in contact with ATA on at least two occasions that day. At some point during his conversations with ATA employees, Pignato requested that he be relieved of his obligation to fly that evening because of (1) stress related to his divorce proceedings, (2) the fact that a second pilot was scheduled to receive training on the same flight and (3) he wished to attend the ATA company Christmas party that evening. Utimately, Pignato reported his status as "sick"

because he was "too stressed out" to fly. During the evening of December 17, Pignato consulted a health care professional and then attended the ATA company Christmas party.

17. Prior to December 17, 1990, Pignato's last flight for ATA was December 9, 1990.

18. Pignato flew for the military reserves on December 14, 20 and 21 of 1990.

19. On December 18, 1990, in keeping with ATA procedures, Pignato called in "well" and asked that his training flight be rescheduled. Due to an error by the scheduler, this phone call was not properly logged.

20. On December 21, 1990, Pignato was suspended without pay by an ATA employee, Jim Hoban, for failing to call in "well" on

December 18, 1990.

21. Pignato later documented through the scheduler that he had called in "well." He was advised that his suspension was no longer in effect. He was further advised to report to Indianapolis on December 31, 1990.

22. Pignato appeared at ATA headquarters on December 31, 1990 and met with corporate representatives. At the conclusion of the meeting, Pignato was discharged from his position with ATA. The reason given by ATA for his termination was "abuse of the sick day policy, representing manipulation of the scheduling system for personal convenience."

23. Pignato filed a claim objecting to his termination by ATA with the State of Illinois Department of Employment Security, Benefit Appeals Subdivision of February 14, 1991. On March 21, 1991, a Hearing Referee conducted a hearing at which Pignato and ATA

appeared and testified. The Hearing Referee upheld ATA's termination of Pignato finding that Pignato "abused his employer's sick leave policy."

24. On July 18, 1991, the State of Illinois Department of Employment Security, Board of Review issued its decision affirming the ruling of the Hearing Referee.

B.

Based on the testimony and exhibits presented at the trial, the court further finds as follows:

25. ATA employs a number of aircraft crew members who are members of Air Force Reserve components. ATA requires these military crew members to, make every effort to perform their military obligations on their G-days. Aircraft crew members receive a fixed salary for 75 flight hours per month. Flight

schedules include scheduled flights substantially less than 75 hours with "blank days" or days when a crew member must fly if told to do so. ATA instructs crew members to bid for ATA flight schedules which do not conflict with their known military training commitments. This rule also applies to all crew members who have personal commitments of any kind. If a military crew member is faced with an unavoidable conflict, the crew member must notify ATA as soon as he or she becomes aware of the conflict. This practice has resulted in very few individual conflicts for the majority of its employees.

26. ATA schedules for each ensuing month are announced by ATA for bidding on or about the 15th of each month. Crew members bid between the 15th and 20th of each month and the schedule for the next month is announced on the 25th of the preceeding month.

27. Defendant has pointed to instances in which, after it awarded the lines or assignments establishing the entire flight schedule for the following month, Pignato would ask to be relieved from an ATA flight (for which he had bid) which conflicted with a military commitment. In some cases, he could have bid for lines which included no such conflicting ATA flight, but he did not. Moreover, he did not immediately notify ATA of the conflict. In those instances ATA was forced to find a replacement crew member for Pignato on short-notice, often affecting two or three crew members, not just one.

28. In instances in which ATA cancelled assignments because of military conflicts, Pignato did not suffer any loss of pay. His annual flight time hours were slightly above average, but did not require overtime. Pignato was told not to bid ATA flight schedules which conflicted with his military commitments, but rather to bid for schedules

which allowed him to perform his military training on his scheduled days off, that if an unavoidable conflict arose, and if Pignato gave ATA adequate notice of the conflict, ATA would move his G-days so that he could attend military training.

29. Prior to March 24, 1987, Pignato bid for and received Line 209, which required him to fly for ATA on days that conflicted with military training commitments (two drill weekends on April 11-12, and 25-26). Pignato knew of the April 11-12 and 25-26 commitments as early as July 18, 1986, and December 16, 1986 respectively, when the Reserve orders were issued scheduling the training. He could have bid for lines which conflicted with only one of the drill weekends. He did not inform ATA of the conflicting military commitments until April 9, 1987, and he did not report for an assignment on April 12. He did not ask for a shift of guaranteed days off to eliminate the conflict.

30. Pignato delivered copies of his orders of July 18, 1986 and December 16, 1986 to a representative of ATA on March 24, 1987. There is no evidence, however, that he identified the conflict with his earlier bid for Line 209 or that he otherwise asked to be relieved because of the conflict before April 9, 1987. ATA terminated Pignato on April 15, 1987, effective April 17, because he bid for a line which contained two known conflicts.

31. On or about June 8, 1987, ATA offered reemployment, subject to the condition that he abide by the bidding rules which apply to all ATA employees. ATA's attorney testified without contradiction, and the court finds it to be a fact, that the offer of reemployment made by ATA's attorney to Pignato's attorney was that the previous termination period would be changed to "unpaid leave;" that no compensation would be paid,

but that Pignato would not lose any seniority when reemployed.

32. On July 1, 1987, Pignato returned to ATA. ATA changed Pignato's personnel records which had reflected his termination on April, 1987, to reflect that he was on unpaid leave of absence from April 17 through June 30, 1987.

33. During October 1989, Pignato requested an upgrade to the position of B-757 copilot, the salary of which was higher than he earned as a B-727 copilot. ATA sought and granted upgrades to its most senior pilots. Pignato was regarded as needing more training. No proficiency report was produced for any period prior to November 13, 1989; however, ATA representatives testified to knowledge of his performance. ATA later placed Pignato in upgrade training in October 1990. Credible evidence exists to support the deferral of his upgrade for one year.

34. Pignato was scheduled to participate in a flight from Norfolk, Virginia on December 18, 1990 to complete his training as a B-757 copilot. He was required to fly as a passenger from Chicago to Norfolk on December 17, 1990 in order to be ready to depart on December 18 on the first leg of a flight which would finish on December 19. On December 17, Pignato first contacted ATA requesting that he be relieved of his obligation to receive training on the same flight sequence, as he understood that he was only to be an observer. He also stated that he wanted to attend the ATA company Christmas party scheduled for that evening. ATA's chief pilot told him to report for the flight; that he was scheduled to fly after the other pilot passed his flight tests. Later the same day, Pignato called ATA and stated that he was "too stressed out" to fly because of his divorce case and, therefore, reported in "sick."

35. During the evening of December 17, Pignato consulted Mark A. Frey, a licensed social worker counselor at Alexian Brothers Hospital about his domestic problems. He then attended the ATA company Christmas party.

36. ATA's sick leave policy provides that it may require medical verification for sick days. A pilot who declares himself to be too ill to fly because of mental problems runs the risk of losing F.A.A. medical certification.

37. On December 18, Pignato reported himself to ATA as "well." He did not return to Frey or visit any medical professional for futher evaluation or treatment. Frey testified that Pignato did not ask him to find, and that he did not find him to be, unable to perform his duties on December 17, 18, or 19, 1990. Frey also testified that Pignato told him he lied to his employer. Frey prepared letters at Pignato's request on

December 29, 1990 and April 30, 1991, which state as follows:

12-29-90

To whom It May Concern:

Mr. Gary Pignato is currently under my care for counseling. He was originally seen on 12-17-90 for a diagnostic evaluation. The results of that evaluation suggest the following:

Axis I - No Diagnosis
Aixs II - No Diagnosis
Axis III - No Diagnosis
Marital Adjustment Problem V61.10

He will continue to be seen by me for issues related to the marital adjustment problem only. Should you have a need to talk with me, please let Mr. Pignato know and the requisite releases of information will be executed.

/ss/ Mark A. Frey LCSW
SCAU
JD
Director, MH/Addictions

* * *

April 30, 1991
Mr. Gary Pignato
1101 Casswell
Elk Grove, IL 60007

TO-WHOM IT MAY CONCERN:

Mr. Pignato recently called me requesting a letter indicating the results of his diagnostic workup. He consulted me for one session on December 17, 1990. At that time his diagnosis was best characterized as marital Adjustment Problem, V61.10. He had no Axis I, II, or III diagnosis. I am mindful of the fact that he requested a letter similar to this on

December 29, 1991 [sic]. In his recent consultation he was not completely open about his condition, apparently fearing that this information could somehow be used against him. He indicates now that he has had a variety of negative signs of depression and a lessing in his mood. Because I have not sen [sic] him in person for over four (4) months I cannot corroborate this. It may be that he was depressed, or that he is now. I can neither rule this in nor out at the present time. A further diagnostic evaluation would be recommended to determine his diagnosis at the present if this is at issue.

Sincerely,

/ss/
Mark A. Frey, LCSW, JD
Director, Mental Health & Addictions

Letter provided directly for the benefit of Mr. Pignato and given to him for his own purposes.

III. CONCLUSIONS OF LAW

Two statutory provisions are relevant to Pignato's claims. Section 2021(b)(3) of Title 38 provides:

> Any person who seeks or holds a position [in private employment] shall not be denied hiring, retention, in employ-

> ment, or any promotion or other incident or advantage of employment because of any obligation as a member of a Reserve component of the Armed Forces.

Section 2024(d) provides:

> Any [military reservist] shall upon request be granted a leave of absence by such person's employer for the period required to perform active duty for training or inactive duty training in the Armed Forces of the United States. Upon such employee's release from a period of such active duty for training or inactive duty training . . ., such employee shall be permitted to return to such employee's position with such seniority, status, pay and vacation as such employee would have had if such employee had not been absent for such purposes.

To succeed on his claims under sections 2021(b)(3), Pignato must show that his terminations were motivated solely by his reserve status. Monroe v. Standard Oil Co., 452 U.S. 549, 559 (1981). Also, the law is clear that an employer need not make special accommodations for reservists, including there being no requirement that preferential work schedules be provided. Id. at 561-65. The only accommodation made to the reservist is that a leave of absence (with or without pay, at the employer's discretion) be granted as required by section 2024(d). Id. at 564. Both parties, however, agree that a leave of absence under section 2024(d) need only be granted where a reasonable request is made. See Ellermets v. Department of Army, 916 F.2d 702, 705 (Fed. Cir. 1990); St. Vincent's Hospitol v. King, 901 F.2d 1068, 1070-72 (11th Cir. 1990), rev'd, 112 S. Ct. 570 (1991); Eidukonis v. Southeastern Ppennsylvania Transportation Authority, 873 F.2d 688, 695 (3d Cir. 1989), cert. denied, 112 S. Ct. 879

(1992); Lee v. City of Pensacola, 634 F.2d 886 (5th Cir. 1981). Contra Kolkhorst v. Tilghman, 897 F.2d 1282, 1285-86 (4th Cir. 1990), cert. denied, 112 S. CT. 865 (1992). Neither party took any note of the contrary view expressed in Kolkhorst. Most importantly, neither party considers the Supreme Court's recent decision in King v. St. Vincent's Hospital, 112 S. Ct. 570 (1991) ("King").

Prior to the Supreme Court's decision in King, the predominate view among the circuit courts was as follows.[1] A resevist's request for leave is presumed to be reasonable. Eidukonis, 873 F.2d at 690; Gulf States Paper Corp. v. Ingram, 811 F.2d 1464, 1469 (11th Cir. 1987). In determining whether the employer has met its burden of overcoming the presumption of reasonableness, a number of factors can be considered with the conduct of the employee being more important consideration than the conduct of the employer. Gulf States, 811 F.2d at 1469. Factors to consider include the employee's options to choose other dates for reserve duty; the amount of notice the employee had and the amount of notice the employee gave to his employer; the length of time to be served; and the good or bad faith of the employee. See Eidukonis, 873 F.2d at 695-96 (collecting cases). It had also been held that the legitimate needs of the employer can be considered including the employer's need for the employee's special skills; the employer's ability to schedule substitutes; special work load circumstances; and the amount of additional costs imposed on the employer. Id. at 696.

Pignato had advance knowledge of his reserve assignment in April of 1987, yet

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[1] The views expressed by the parties in their trial briefs and proposed conclusions of law are consistent with an application of a reasonableness standard.

waited until shortly before the days he would be off to inform ATA. The failure to give sufficient notice to one's employer when the employee has advance notice of reserve dates has been held to be an unreasonable request under section 2024(d). See Burkart v. Post-Browning, Inc., 859 F.2d 1245 (6th Cir. 1988); Sawyer v. Swift & Co., 836 F.2d 1257 (10th Cir. 1988); Eidukonis, supra; Lee, supra. Also, the evidence supports that Pignato often had a number of reserve and work options to choose from yet acted in bad faith in intentionally seeking to schedule his reserve dates in order to interfere with his work dates. Furthermore. Pignato's conduct interfered with the effectiveness of ATA's bidding method for setting pilots' schedules. For the reasons discussed, plaintiff made an unreasonable request. Therefore, under the predominate circuit court precendents, ATA's April 1987 decision to terminate plaintiff was not discrimination in violation of section

2021(b)(3). See Eidukonis, 873 F.2d at 696; Sawyer, 836 F.2d at 1262.

Although not even cited by the parties, this court will take notice of the Supreme Court's recent decision in King. In King, the Supreme Court noted that the Third, Fifth, and Eleventh Circuits had engrafted a reasonableness requirement onto section 2024(d) while the Fourth Circuit had not. "We granted certiorari to resolve this conflict, 498 U.S.__, 111 S. Ct. 950 (1991), and now reverse the judgement of the Eleventh Circuit." King, 112 S. Ct. at 572. Although the Court expressly stated that it had granted certiorari to resolve this conflict, the Supreme Court did not directly discuss reasonableness in King. The holding of King is that section 2024(d) contains no express time limitation as to the length of any reserve duty for which section 2024(d) would still apply and that no such time limitation would be read into the statute. To the extent reasonableness survives _King_, the one clear holding is that the length of the employee's reserve duty is not a factor to be considered in determining reasonableness.

A possible implication of _King_ is that reasonableness can no longer be considered at all and section 2024(d) should be applied literally with any request for leave from work based on reserve duty being a request that must be granted by the employer. While implied, such a general holding is not discussed. Only one case has been found which considers the holding of _King_ as to reasonableness. In that case, the Fifth Circuit states the following:

> . . . Swint argues that the district court clearly erred in finding that Cole requested a reasonable leave of absence. This argument is contrary to the weight of evidence, which demonstrated that Cole

> asked Swint if he could have a Saturday off for his drill. Swint also argues that there is a reasonableness requirement for time of the requested leave itself. The Supreme Court has recently rejected the implication of a reasonableness requirement.
>
> King v. St. Vincent's Hospital, 112 S. Ct. 570 (1991) (overruling Lee v. City of Pensacola, 634 F.2d 886 (5th Cir. 1981)). Accordingly, an argument based upon the reasonableness of leave requested must fail.

Cole v. Swint, 961 F. 2d 58, 60 (5th Cir. 1992).

Whether the requirement of reasonableness in any manner survives King need not be decided in the present case in that each of Pignato's claims fails even if the lack of reasonable requests is ignored.

Pignato's termination and backpay claims related to his April 1987 termination fail because he accepted ATA's offer to settle his claim, based upon reemployment with treatment of his discharge as unpaid leave without loss of seniority. See generally Laserage Technology Corp. v. CAPCO, Inc., 972 F.2d 799, ____ (7th Cir. 1992). Having previously settled this claim, Pignato cannot raise it in the present proceeding.

As to Pignato's claimed delay in promoting him, Pignato failed to prove that ATA's delay in upgrading him to B-757 copilot in 1989 was caused or motivated by his reserve status. ATA denied Pignato's upgrade based upon proficiency and experience. Upon satisfactory completion of evaluation requirements and further flight experience, ATA did upgrade Pignato in October 1990.

Pignato also failed to prove that his 1990 termination was motivated by his reserve status. ATA terminated Pignato based upon his violation of ATA's "sick day" policy. The credible evidence shows that Pignato wanted a personal day because he was engaged in a bitter divorce contest and because he wanted to attend the company Christmas party. Credible evidence exists to support defendant's conclusion that Pignato misrepresented his health and his ability to travel as a passenger to Norfolk, Virginia on December 17. This conclusion is reinforced by what occurred on December 17 and 18, including Pignato's statement that he was well on December 18. Whether ATA's judgment of Pignato's conduct was right, wrong, or harsh is not the test. It was not pretextual.

IT IS THEREFORE ORDERED that the Clerk of the Court enter a judgement on the merits in favor of the defendant American Trans Air and against the plaintiff Gary D. Pignato dismissing plaintiff's cause of action with prejudice.

ENTER:

(William T. Hart signature)

UNITED STATES DISTRICT COURT JUDGE

Dated: October 15, 1992

T.42,..46

A...engineer, since you are required to have a mechanic's license in that position with American Trans Air.

Q And what positions did you hold with ATA from December of 1985 until 1987?

A Flight engineer on the 727, B727.

Q And who was your immediate supervisor during that period of time?

A Bert Kaiser was the immediate supervisor in Indianapolis, the chief flight engineer.

Q And during that same period of time, what were you responsibilities with the military?

A The same -- the basic responsibilities I set forth in my affidavit, which are four to five days per month flying UTAs, which are Unit Training Assemblies, and AFTPs, which are Additional Flying Training Periods, and then 15 days annual active duty.

Q During the period December '85 through April of 1987, did you have any difficulties at ATA regarding scheduling your work with ATA and your military obligations?

A In October of 1986, after I had come back from a deployment to Turkey with my military unit, American Trans Air requested that I fly on my guaranteed days off, which was overtime flying.

I explained that those days were my unit training assembly weekend days and it was not mandatory that I attend

T. 43

those drill days on the 17th and 18th in particular in '86, in October, and I would be willing to help them out, however, I would have to make up those UTAs at the end of the month. So if they needed me, I would be willing to help them out, and I went ahead and worked for the overtime pay later on in the month, told them that I needed to go to my Guard unit, and they denied me military leave and moved the two days which I worked to the end of October, forfeiting the overtime pay.

Q Who were you dealing with at ATA at that point in time?

A The initial contact was with crew scheduling, asking me to help them, then the other contacts were with Bert Kaiser, my immediate supervisor who intervened and moved the overtime work days to the end of the month to accomodate military leave.

Q As far as you were concerned, at that point in time was the problem resolved?

A No, I expressed the fact that I was upset about what had happened and felt that I was doing them a favor, and why wasn't I allowed the time off, because I was setting reserves when I had nothing scheduled and why would I not just be allowed the time off without pay, which I would be money ahead by getting overtime pay and I just -- being docked, as you would say, two days.

Q Who did you address that comment to?

A Bert Kaiser, my immediate supervisor.

T. 44

Q And what was his response?

A You're just going to have to settle for it. And I said, "Well, who do I speak to?" He said, "No one," basically, "Me."

Q Okay. What was your next incident you had regarding a conflict between ATA and your military obligation?

A March 12th, 1986 I called to confirm for a flight on March 13th. Confirming for a flight is you have to call in before 6:00 p.m. the previous day for the next day's flight, upon which American Trans Air's scheduling department put me on hold for a long period of time and confirmed my flight for the 13th and added a flight on the 14th of March, which was a day subject to assignment with American Trans Air but not a reserve day where I would be on call, and I explained that it was my drill weekend with the military and normally I don't have to attend the UTA weekend unless it is mandatory, and March 1987 drills were mandatory being we were preparing for an ORI, Operational Readiness Inspection, so I would not be able to do the flight.

Q And what was Bert Kaiser's response?

A Bert Kaiser had called me back after speaking with the scheduling department who contacted Bert and told me that if I did not show for the flight I would be terminated or put down as a no show and terminated, my employment would be terminated.

Q So what did you do?

A I went ahead and contacted my military unit and told them what was going on, spoke to Major Jim Baker and he told me that this type of treatment is not suppose to go on, however, this drill weekend is not me worth losing my job over so go ahead and fly the trip to salvage my job. But in April, next month, we have two drill sessions, which are two weekends you need to attend, so do what you need to do but by all means salvage your job.

Q What happened next?

A Something to add there is I checked the federal regulations and I was actually illegal to fly that trip since it was a scheduled flight, under Federal Aviation Regulation Part 121, which puts a duty restriction on every crew member flying in the cockpit of 30 hours in seven days, and I had already flown 34.22 hours, which was legal Part 121 as a charter. However, scheduled service I was illegal to do that trip and did not realize it until after I had done it.

Q Did you bring that to the attention of anyone at ATA?

A I did not realize until I started going through my records.

Q Okay, what is the next incident that you recall happening between yourself and ATA?

A After I had dropped a memo and my military orders off in

the office of American Trans Air on March 24th, directing it to Lon Lett, who was the gentleman I was directed to by Bert Kaiser to handle the military leave issue, I was awarded a line in April of which I had two drill sessions. The first ten days of April I flew with

American Trans Air, I only had one day off, which was April 7th of '87, upon which that day I spent a good portion of my day trying to get ahold of someone who could confirm that I had military time off that I needed.

And I finally got ahold of Mr. Lett and he confirmed that, yes, you have the time off.

I directed that fact of the amended orders and told him I had two drill weekends and wanted to be sure that the conflicting trips, I was relieved of the conflicting trips, and he commented that, yes, you are, don't worry about it, however, you are going to be on reserve the rest of your life. That was his comment.

And I said, well, I was threatened to be teriminated last month and I want to be sure that everything was taken care of.

And he said it is all taken care of.

Q Okay.

A I went to my drill weekend on the 11th.

THE COURT: What does that mean, you are going to be on reserve the rest of your life ?

T. 60,..61

A No.

B In each of the years that you worked there, did you take less than that amount?

A Yes, I did.

Q You were promoted then to B727 copilot in October of '88, is that correct?

A To the position to train for that position.

Q Okay, and when did you actually receive promotion?

A January of 1989 I completed my initial operating experience IOE and was a full card carrier in the right seat of the 727.

Q When was the next time that you had any difficulty with ATA regarding scheduling and your military obligations?

A In August of 1989 I was awarded a schedule as a reserve pilot for September of 1989 and I contacted the scheduling department expressing the fact that I was requesting military leave for September 20th through 24th or 25th of 1989 to go to a deployment to Hill Air Force Base, Utah, to support their operation on readiness and inspection.

Q Gary, before we go into that, were there any problems or difficulties in June of 1989?

A In June of 1989?

Q Regarding trips to Europe or England and Turkey?

A That is correct, in June of 1989 I was awarded a flying line for July of 1989 at the end of June, and in that month

American Trans Air was having a lot of contract problems with -- or scheduling problems with their contracts and who was going to fly what in Europe because they had some subservice contracts in Europe. I was awarded a line that I did not bid to Turkey, leaving at the end of June. I had received notice of that, I believe it was June 27th, after a trip termination, Tuesday, June 27.

When I returned home I had a message on my answering machine saying that my military unit said I needed to come in for a check ride in the simulator since I didn't have that and my tactical check ride wouldn't count and I risked the possibility if I didn't have it at the end of June of being FEB, which is a board and they ask you why you did't get--

MR. MCLAUGHLIN: Your Honor, I am sorry, cannot hear him.

Q Go a little bit slower and a little bit clearer and speak up.

A Okay, I would risk the possibilitiy of losing my position as rated pilot with the Air National Guard if I did not get this check ride or I would be called on the carpet in front of my commander.

So I expressed that to the scheduling department and said that I did not bid that line and I cannot accept that...

T. 64

Q Gary, we broke when you were discussing conversation with Tom Leonard about your having to make a choice between the military and ATA. At the conclusion of that conversation, did Tom Leonard tell you that you should speak to anybody else at ATA?

A Yes. He directed me to speak to Steve Cooper, who was the chief pilot at that time.

Q Did you have a conversation with Steve Cooper?

A Yes, I had a conversation with Steve Cooper establishing the basis that if I had any kind of military duty that conflicted with American Trans Air schedule that he would allow me the time off without pay as I requested, and I pointed to the fact that that is the way it is supposed to be handled in the document which was an employee policy handbook that I was originally employed under.

Q When was the next time you had a difficulty involving your military obligation and ATA?

A In August of 1989 I requested through the scheduling department that I be allowed to attend a deploynment to Hill Air Force Base the 20th to the 24th of September of 1989. The scheduling department told me that they didn't have authorization to allow military leave and directed me to speak with Steve Cooper. The latter part August through the first part of September

I tried and left numerous messages for Steve Cooper....

T. 78,..80

A...upgraded to 757 was, per Mike Doades' conversation, because I was in the military and I would conflict with the 757 flying schedule.

Q Tell us your discussion with John Zetsman how the military leave poilicy was going to be handled.

MR. MCLAUGHLIN: Same objection, hearsay, your Honor.

BY MR. LEVIN:

Q I am sorry, John Zetsman works for who?

A American Trans Air.

Q What is his position with them?

A At that time he was the supervisor or the manager of crew members in Chicago.

Q Okay, tell us what you said to John Zetsman and he said to you regarding how the military leave policy was to be handled.

MR. MCLAUGHLIN: Same objection, your Honor.

THE COURT: overruled.

BY THE WITNESS:

A Mr. Zetsman came out with a letter specifying the fact that from here on out I was to bid my schedule so that all my military duty had fallen on my guaranteed days off, then blank days, which are subject to assignment, and if that didn't work, then they would move my guaranteed days off accomodate

the military commitment.

I openly disagreed with the policy and told him the scenario remains that what if American Trans Air will assign me or tell me that I need to fly a line. The only line that accomodates the military is in Europe for 19 days and I have to take that flying line to accomodate the military leave. That leaves me 19 days not including travel time and then five five days with the military out of town, which only allows me a handful of days to mow my lawn, pay my bills and shake hands with my children, and I said that scenario is very realistic and he agreed with me and said, yes it is.

Q Were you refusing to try to schedule your military time on your guaranteed days off?

A No, I was not.

Q Okay, well, what was your opinion regarding it?

A My position was that I agreed that I would be willing to do my military time on guaranteed days off, however, that scenario remains I didn't want to be held hard and fast on the fact that I needed to do all my military on my time off, so I expressed to him that I didn't agree with it due to that fact.

Q Did he tell you he thought you correct or incorrect or what was his position?

A His position was, well, this is the way it is going to

be handled. And I said, well, I simply don't agree with it. And he said you need to sign this sheet of paper agreeing with it. I said, well, I don't agree with it. He said well, this is just acknowledging that we had this meeting. And I said, well, if that is all it is, fine, I said I will sign it that we had this meeting but I do not agree with this letter.

Q Gary, up to that point in time, that is November or December of 1989, how much of your military duty, if you can estimate for us, had you scheduled on your guaranteed guaranteed days off, what percentage?

A I would have to look at the figures, but I would guess they would be in the 90 percent range.

Q Okay, and what was your objection to making it 100 percent? Why did you want that 10 percent gap or --

A So I could maintain some sanity by the scenario of having some time off each month so I could spend time with my children.

Q And what did you understand ATA's position to be as communicated to you by John Zetsman?

My interpretation of the letter was they didn't care...

T. 88

Q Okay, Gary, After you had the February of '90 proficiency evaluation, were you allowed into any B757 training classes?

A No, I was not.

Q Was ATA conducting 757 training classes?

A Yes, they were, on a continuous basis.

Q Okay, what, if anything, happened then in March of 1990, after this check ride regarding bids or something of that nature?

A In March of 1990 I bid for a schedule for April of 1990 and I put down the fact that I needed a specific drill weekend off because it was a mandatory drill session that I needed to attend for my military commitment.

The bids were awarded out of seniority due the fact that I needed that specific weekend off.

I called crew scheduling and pointed to fact that there must be a mistake in the bid award since I wanted line, I believe 217, and Warren Peach (phon.) who was second from the bottom of the seniority list was much lower than I on the seniority list got that flying line and I was awarded I believe line 215.

The scheduler had pointed to the John Zetsman letter saying that they award my schedule according to what days accomodated the military leave -- let me rephrase that -- they would award my schedule to put my G days so that...

T. 96,..97

A I would say the afternoon two days prior, which would be the 15th of December.

Where had you come back from when you got that message on your answering machine?

The military.

Q So I take it you had not planned prior to receiving that call of going anywhere on December 17th, is that correct?

A No, I did not.

Q Okay. Now, when you called Jim Hoban at 7:45 a.m., what were you going to ask him for?

A I was going to ask him for a personal day to take care of all the facts that I had at home so I can work my divorce and get ahold of my attorney and get detailed information on bills and everything to my attorney, fax some things to him, and then maybe meet with him if I could possibly meet with my attorney.

Q Okay, what was your feeling about your divorce situation at that time?

A There was -- it was a very bad feeling situation. As it was at home so bad that I was taxed with the responsibility of taking care of all my children and the bills and everything else, and my wife, finding out when she was going to be around or when she was going to come home.

Q There was a divorce proceeding pending, correct?

A Yes.

Q Were you and your wife living at the same house?

A Yes.

Q How was that working out at the time?

A Very, very bad.

Q Would you decribe a little bit about it for us?

THE COURT: Let's recess until 2:00 o'clock at this time.

(Court recessed to 2:00 p.m. of the same date, 9/21/92.)

A...things, and in particular what had happened in court. I was obligated to give her 60 percent of my net income and with the remaining 40 percent pay the mortgage, utilities and all the rest of the bills, credit cards, and there simply was not enough money to do that. And I was eating Burger King hamburgers for a diet and she was going grocery shopping, keeping groceries in the trunk of her car. She would commonly leave and I didn't know when she was coming back.

So I had control of the children and I was trying to deal with that.

Q And was that the status of events on December 17, 1990?

A Yes, and I was looking at the long distance telephone calls on my credit card, which she commonly would spend about an hour on the telephone speaking long distance to her friends in Wisconsin.

Q And how many attorneys had you had representing you in the divorce? What attorney number were you on at this time on December 17th?

A It was my third attorney. The first attorney didn't do me very well. The second attorney could have done me real well, however, he saw what I was up against and referred the case to an attorney that he had worked with and learned divorce law from.

Q And had you given any documents to that attorney yet?

A...don't know. Let me check into it.

And so I kind of left it with Don Lanham to get ahold of Mike Carrlozzi and speak to him about it I guess was what the deal was since he didn't have the authorization to take me off the trip.

Q Who is the next person on that date from ATA that you had a conversation with about this subject?

A It was my chief pilot Mike Carlozzi.

Q During that conversation, what did you say to Mike Carlozzi and what did he say to you?

A I told him that I was having a lot of marital problems, explained to him what was going on at the household, explained to him about the October episode in the court with my wife and the judge.

He remarked that it seemed like I needed a new attorney.

And I said, well, I am on my third attorney, and I told him, I said, and the company Christmas party is tonight, I said and I am not calling about this to get off to go to the company Christmas party, I said, but I would like to go to the company Christmas party. And I said I feel as though it probably would do me good.

Q Did you discuss your physical or mental condition with Mike Carlozzi?

A Yes, I did.

T. 110

Q What did you say in that regard?

A I told him I was up to my neck in alligators basically, an analogy, and I needed to work out everything, get all papers together and get information to my attorney to try to work things out, and my wife was gone at that point and I didn't know when she was coming home, if she was coming home at all.

Q Did you have any other conversations with Mike Carlozzi on that day?

A To the best of my knowledge I believe I had one conversation, maybe two conversations, but to the best of my knowledge it was one conversation.

Q And did you mention the subject of stress with Mike Carlozzi?

A Yes. He brought it up about being stressed and I said, well, to be honest, I do feel that way but I don't really want to commit myself to saying I am stressed since it would be, oh, acknowledging something that maybe could hurt my career.

Q What did he say?

A He told me if I felt too stressed to fly to go ahead and call in sick and go see a medical doctor.

Q Did you say anything else to him or did he say anything else to you during this cinversation?

A I told him, well, if that is what it takes, Mike, I am probably going to do that.

T. 111

Q And what did he say?

A He said the decision is yours.

Q Okay, and what time was this last conversation with him?

A This was mid-afternoon, probably, I would guess, right around 2:00 o'clock or 2:30 or something like that.

Q And do you know whether or not you had a prior conversation on that day?

A To the best of my knowledge I thought I had one conversation with him. I was -- how would you say -- my memory was -- I had a lot going on at that time. I thought I had one conversation with him but it is possible I had two, I really don't know.

Q Other than speaking to Don Lanham and Mike Carlozzi, did you speak to any other ATA employees that day?

A The crew scheduling department.

Q And was that something we have already discussed?

A No, that is after the fact. I went ahead and called in sick and went ahead and called Alexian Brothers emergency room and tried to get hold of somebody, a counselor.

Q And what caused you to call Alexian Brothers?

A I wanted action now. I wanted to talk to somebody now. I wanted someone to document what was going on in my life at that point and I didn't want to wait for an appointment to go see a doctor.

Q At the time you spoke to Mike Carlozzi, did you...

T. 114,..115

A...I need to not just protect myself but my children also.

So I made and appointment to go back and see him at that point and --

Q Okay, Gary, you were with him for an hour 20 minutes, you said; could you tell us what, if anything, you discussed with him regarding the subject of your stress and things of that nature?

A Yes. I explained to him the situation with not just my divorce but with the fact that my father had terminal cancer, and the fact that American Trans Air was continually giving me a problem about trying take military leave.

I explained to him a lot about my wife and how she had taken off on me and all the detailed information that goes along with that.

Q Gary, did you express to Dr. Frey any concern you had about making a public record regarding stress?

A He told me that he is going to put that I am stressed, and I told him that it wouldn't be a good idea, I wouldn't want him to put that down.

Q Why not?

A Because it was an effort to protect myself and my career, that I felt I needed to draw a line somewhere and there is a point to where you reach, you just really need to talk to somebody about it.

So he agreed and basically put down that I was

going through marital adjustment problems.

Q How did you feel, Gary, after you met with Dr. Frey?

A I felt good that I finally had somebody that I could talk to, maybe some continuity with someone who will sit down and be able to document what is going on in my life, that people don't just think -- or if I am speaking with someone they don't think that I am off the wall, that I would have some kind of evidence or some proof that things in my life aren't really going the way they should be, I guess.

Q What did you do after your -- is there anything else you can recall about your visit with Dr. Frey?

A Feeling good about shaking his hand and him telling me that he understood, he understood, and I was looking forward to seeing him again.

Q What did you do after your meeting with Dr. Frey?

A I went home.

Q And what time was that appoximately?

A That was probably about 8:00 o'clock. I only live about ten minutes away.

Q And what did you do after you got home?

A I just kind of shuffled papers around and everything, tried to figure out what

I was going to put together and try to get to my attorney, and thought about going to the Christmas party, and then I went ahead and I just went to the Christmas party.

T. 130, 131

Q I am sorry, Jim Hoban was there also?

A Yes, Jim Hoban was there.

Q Okay.

A The questions came from Steve Cooper and Dick Meyers and they asked why I had called in sick.

And I explained to them the circumstances behind my family divorce, and I got into intricate details about what had gone on with my wife and what I had explained to Mike Carlozzi over the telephone.

They went ahead and stated that their position is they were asking me this and they didn't understand why I could -- I would call in sick and to a company

Christmas party, and did I feel like I was too stressed to fly.

And I explained to them that there is a point in one's life where you have got 218 people on board an airplane and where do you draw the line as far as being stressed, or do you draw the line then an accident happens, I said, so being a pilot I explained about compartmentalizing, not letting your emotions get involved in flying, and then I understand a lot about myself and I felt as though I needed to speak to somebody on a professional level at that point because I was basically scrambled eggs at that point.

And they asked me if I was too stressed to fly and I said -- I told them that I had felt that I was at that point where I was stressed but I really don't want to document the fact that I was stressed, in order to avoid a career ruining move if something that was in your medical files said you were stressed you might as well kiss your career goodbye if you are going to be an airline pilot or a pilot for the United States military.

Q Okay, did they ask you how you felt about seeing the counselor?

A Yes, they did, at one point, and I told them that I was going to maintain continuity with the man and I had an appointment to go see him, but I believe it was about a week and a half after my initial visit.

Did they ask you whether or not the counselor had helped?

A Yes, they did, and acknowledged, yes, that that I felt as though he did help.

Q Okay, did you discuss with them your conversations with Don Lanham?

A Yes, I expressed to them that hearing it from Don Lanham, the policy of American Trans Air being that initial operating experience will not -- initial operating experience will not be completed by someone sitting as an observer and not flying the aircraft.

Q Okay, is there anything else you can recall discussing at the initial part of your meeting with them?

A No, not at this point, no.

Q Was there a break or what happened then?

A United Airlines provided, at my request when the ticket was purchased, and the ticket was purchased at 10:56 local time, before the meeting was ever held.

Q Can you point to where on that document it shows that?

A It is underlined as December 31st -- 31st December 1556 Z time minus five is 10:56 local time, and the gentleman who provided it, his name is Terry Obenoff (phon.) for United Airlines and the arrival information or the flight is on the top of that document.

Q Okay, did you discuss with anyone subsequent to this point in time, did you discuss with anyone from ATA the fact that they had in fact purchased a ticket prior to the meeting?

A Yes, after they handed me the ticket in the meeting I pulled the ticket out and was suprised to see that it was a ticket, and I said it is very obvious to me that nothing that happened at this meeting had anything to do with your decision to terminate me.

Q Did anyone respond to that?

A No, they did not.

Q And that was before you actually knew for sure that the ticket had been purchased before the meeting?

A That is correct.

Q Gary, did you violate any ATA sick day policies at any time in December of 1990?

A No, I didn't.

T. 176,..177

Q...your senority, as high as you could get, correct? You knew where you stood in the seniority?

A But I knew not what the senior pilots to me schedules would get, so it was basically a gamble as to what line I would get.

Q But you can know that you are at least going to fall in certain lines, aren't you?

A Unless I put down that I have military drill weekend on the bottom of the sheet and then they would award my schedule out of seniority.

Q And you were aware that American Trans Air asked you to bid your military obligations like they asked any other employee to bid their their personal obligations, isn't that correct?

A I am not familiar with any personal obligation policy that American Trans Air has except for what I guess Steve Cooper had said in his affidavit.

Q And the policy was you were fully aware that they expect other pilots to bid personal commitments so that they do not conflict with their American Trans Air schedule if possible, correct?

A That is correct.

Q And that is all they were asking you to do, isn't it?

A No.

Q They were asking you to schedule you commitments on days

that did not conflict with American Trans Air schedules?

A They were -- I am sorry, they were asking me to do all my military commitment on my guaranteed days off, is what their priority was.

Q They were asking you to do any of your commitments on days that fit within your American Trans Air schedule, weren't they?

A That is correct.

Q Many times you didn't give American Trans Air any advance notice of your military obligations, did you?

A No, that is not correct.

Q Well, you mentioned that you knew your UTA schedules in the fall of the year before, correct?

A That is correct.

Q And you didn't send that on to American Trans Air when you got that in the fall, did you?

A No, I didn't.

Q All right, and the AFTPs really isn't an issue because you didn't have to schedule those until you already had your American

Trans Air schedule for the month, correct?

A That is correct -- excuse me, could I go back two questions there on the UTA schedule? I did provide a schedule, UTA schedule, Lon Lett.

Q You did one time in March of '87, correct?

A That is correct.

T. 216,..217

Q Up until that same date, did you have any knowledge of any scheduling problems Gary Pignato had?

A No, sir.

Q Did you ever talk with anyone or overhear anyone discussing Mr. Pignato's military commitments before that?

A No, I don't believe so.

Q Before December 17, 1990, did you even know Gary Pignato?

A No, I don't think I know Mr. Pignato today.

Q Did you ever receive any instructions either up to that time or after that time to look for reasons to terminate him?

A No, sir. I would not tolerate such a statement.

Q Let's focus your attention on December 17, 1990. What was your first knowledge of the events on that date involving Gary Pignato?

A I received a phone call from captain Don Lanham who was the manager of flight crew training.

And he apparently had received a call from Mr. Pignato, stating that he was scheduled to do a trip the following day, and he did not particularly want to take that trip due to the fact that he thought it was going to be done soley from the observer seat on the 757.

MR. LEVIN: Judge, I'm just going to object on the basis that this is hearsay.

We are not introducing it at this point in time. He's now telling us what another ATA employee told him, which

is a disputed issue. That person is not available, I don't think, for cross-examination, so I object on the basis of hearsay as to anything Lanham told him.

MR. TINAGLIA: We are not offering this for the truth of what was said at that point, just what his understanding was at the time.

THE COURT: Well, I will sustain this as to hearsay.

BY MR. TINAGLIA:

Q Approximately what time did you receive a telephone call from Mr. Lanham?

A I'm going to -- 9:30.

Q All right. What did you do based on that conversation?

A I went over to the people in charge of the scheduling for our training department, and I asked them what they had planned for Mr. Pignato. And he was on a four-leg trip --

MR. LEVIN: Same objection, Judge. Once again, this is hearsay.

THE COURT: Well, not as -- as to what they told him, but did you subsequently talk to Pignato at all that day?

A Yes, sir, I did.

THE COURT: You talked to him?

T. 223,..224

A..I returned that phone call.

Q All right. What did you say to him and what did he say to you?

A He informed me that he was in the process of getting a divorce, and that it was a very stressful situation, and that his wife was receiving, I believe he said 60 percent of his income.

And he was still living with her, and that she just left and that he would -- she would return at 5:00 o'clock that evening. And, again, that it was most stressful, and that what he really needed to do was to go to a Christmas party.

Q What did you say to him?

A Obviously, warning signs started going off -- wait a minute, what's going on here. A few hours ago, he's telling me that he wants out of the trip to go to the Christmas party, and in the past four hours, he's developed this very stressful situation that's not going to allow him to function.

So I informed him that if he was telling me that he could not function or perform his duties because of this stressful situation he found himself in, that he would have to make a decision.

I'm not going to tell him to go fly an airplane in this condition; that he was expected to make this decision, and let me know what it was.

Q Did you ever suggest that he could get out of the flight by simply calling in sick?

A No, no sir.

Q Would you ever do such a thing?

A No.

Q Did he ever tell you, Well, if that's what it takes, then that's what I will do?

A No, not at all.

Q All right. How was it left at the end of that telephone conversation?

A I told him again that he was expected to fly the trip, and that he had a decision to make if what we had talked about earlier was in fact true, and that he should let me know.

Q What happened after that point?

A So far as my conversaitons --

Q Did you have any conversations with him rest of that day?

A No, sir, I did not.

MR. TINAGLIA: Your Honor, I will be referring to Tab 27, Exhibit 27.

BY MR. TINAGLIA:

Q Did you take any notes of your conversations with Mr. Pignato?

T. 236,..237

Q...before his termination? Did you know that Gary Pignato had a lawsuit against ATA before his termination?

A I probably did.

Q How did you find that out?

A Someone probably would have mentioned it.

Q Who would have probably mentioned it?

A Perhaps Tom, Steve, Jim, Mike Doades.

Q They all might have mentioned it?

A I -- I was cognizant of the fact that Mr. Pignato was engaged in legal activities with regard to the company prior to the December 31st date of 1990.

Q Did you know what the lawsuit involved?

A Not really, no.

Q Did someone tell you it involved a dispute between his ATA scheduling and his military scheduling?

A No, sir, they did not.

Q Did you know generally that's what it was about?

A I do now.

Q Did you know then?

A No, I did not.

Q So did you -- when you -- strike that. Now, you say that it's -- what's a pilot's obligation -- when a pilot feels stressed, what is his obligation?

A I would assume he would have to evaluate himself and

T. 237

determine the seriousness of the stress.

Q Okay. And if he feels that he's too stressed to fly, should he fly?

A That would be a personal decision.

Q Would that be a decision you would respect?

A Yes.

Q Now, you say there is a certain reporting requirement you have to do when you are too stressed to fly?

A Yes, sir.

Q And you have to report it to what entities?

A The Federal Air Regulations require that it be reported to the aviation medical examiner.

Q And you were well aware of that requirement on December 17, 1990?

A Yes, it's very common.

Q When Gary told you he was too stressed to fly, did you tell him to make those reports?

A No, I didn't.

Q Did -- after you found out he went to see a doctor saying he was too stressed to fly, did you make those reports?

A No, I did not, nor is it my job to.

Q Well, told him he should see a doctor, didn't you, if...

T. 255,..258

MR. LEVIN: ..Judge, may I mark this as Plaintiff's Exhibit -- I think it's already in there as Plaintiff's Exhibit "S" which is a portion of the telephone log, but to save the Court time, I will give you a copy of it. Because it might be hard to find within the exhibit.

THE COURT: All right. I will look for it. I don't see any "S" in here.

MR. LEVIN: I'm sorry, Judge, I thought we tendered up an "S". I mean, there is an "S" in our pretrial memo.

THE COURT: Let me look.

MR. LEVIN: Judge, may I mark this as "S" and tender it.

THE COURT: Sure. Go ahead.

BY MR. LEVIN:

Q Sir, by the way, when we took a break, you went to look for additional notes. Did you find any?

A No, I didn't

Q Okay. Now, you had a telephone log of your conversations with Gary Pignato on December 17, 1990?

A I have -- what may I see what you are referring to there.

Q No, sir, did you write down in a telephone log your conversations with Gary Pignato on December 17, 1990?

A That's what this is, yes.

Q Okay. You said there is a document that would have the time of your telephone calls with Gary Pignato, is that correct?

A Yes.

Q What is that document?

A That's the telephone logs that messages who calls where, and things such as that.

Q Have -- do you know where that's located today?

A Yes, I do.

Q Where?

A In my telephone log.

Q Is that in the courtroom?

A No, it's not.

Q Okay. So in a document that's not in the courtroom, you have a log that shows the time of your telephone conversations with Gary Pignato on December 17, 1990, correct?

A I believe it might be in there, yes.

Q Does that log that's not in the courtroom also contain a summary of the conversations?

A No, that's what this is.

Q So in one document, you write down the conversation and the time, and in another document, you write down what the person said?

A No, sir, I did not write it down. These are when -- the incoming calls to me are taken by our secretary.

Q Well, on the 17th, when you were writing these notes

T. 257

Supposedly that you wrote on the 17th, did you write in here the time of the telephone calls you had with Gary?

A This one, no, I did not. I may have in another telephone log. I could go find it.

Q Okay.

A I called Gary in the morning.

Q Sir, this other telephone log -- is there another telephone where you wrote this stuff down?

A If you -- like this, is this what you are referring to?

Q Yes.

A These are my notes.

Q Exhibit 27 is your note?

A That's correct.

Q It says a.m., p.m. It has no time for the conversations on the 17th?

A That's correct.

Q Did you, Mike Carlozzi, ever write down on a piece of paper the times of your conversations with Gary Pignato on the 17th?

A I may have. I don't know.

Q Where would you have written that down?

A In a telephone log somewhere.

Q And that telephone log is not in this courtroom, as far as you know?

A That's correct.

T. 258

Q And is that a record that you maintained the normal course of your business?

A Yes, it is.

Q Would that telephone log also record when you had the conversation with Steve Cooper?

A No, it would not.

Q Would it record the conversation you had with Jim Hogan about Gary Pignato?

A No, it would not.

Q Would that log or book record a summary of your conversations with Gary Pignato?

A No, that's what this is.

Q Now, what are the boards that you checked? What's that mean?

A They are analogs that come out for seven days in advance that show who the crew members are that are operating the various trips.

Q And are those the boards that you checked that's referred to in your notes?

A Yes.

Q And when you check the boards -- boards, it said Hubbard on trip?

A That's correct.

Q What happened to Powers?

A I didn't go into that detail. I just wanted to see if...

T. 267

Q...too stressed out or could not cope, whether he should fly or not, correct?

A That is correct, he had to make the decision.

Q And then you told him to let you know about that decision?

A That's correct.

Q And then, in fact, on that date, he did call in sick, correct?

A That's correct.

Q You didn't tell him he should fly, did you?

A I did not.

Q In fact, you put in your note the words, warning bells , correct?

A That's correct.

Q You are aware, are you not, sir, that a divorce or marital problems around Christmas time can cause stress, correct?

A That's right.

MR. TINAGLIA: Your Honor, we have allowed this to go on for some time.

T. 276,..277

A Reserve days, there might be three to four days and, then, finally, depending on the month of the year, they have guaranteed days off.

We put them in the pattern with the initial G , meaning a guaranteed day.

And those are days that the pilot is not subject to assignment unless he elects to do so.

If he elects to fly on those days, he is paid overtime from the pattern guarantee.

Q All right. How are the -- once a pilot makes certain bids, how are those bids awarded?

A Well, the pilot bids are then -- have a closing date each month, those pilot that have entered their bid.

The crew scheduling department, the planning department will take those bids, they put the most senior man on top, working to the most junior man in that status, and they will award those assignments to those people, unless there is particular training or the person has an upgrade trainging, or he has a vacation bid. He will be getting the choice in order of seniority.

Q What are the rules for a pilot to follow in bidding regarding conflicts?

A Well, every pilot has personal obligations. They might have family affairs, or we have many military pilots that have military commitments.

the rules that most everybody follows is that the next month, they already know what their commitments are personally. They bid those months free of duty where they will not have a conflict with their assignment.

If I had a doctor appointment on the 15th or 16th, I would look for a pattern that was free of duty or a guaranteed day off on the 15th, 16th, of the month and I would bid that first.

Q What if there is an unavoidable conflict that they weren't able to bid around?

A If my seniority is less than what could get me that particular pattern, and I notify the flight manager and/or the scheduling department, the scheduling department first, and if I could not work it out with them, the flight manager, I would try to get a modification to that pattern that was suitable to the company and suitable to my needs.

Q Are military commitments treated any differently than personal commitments?

A Military commitments are not treated any differently than personal commitments because we expect the pilots to bid the pattern that have those free of duty. If there becomes a conflict, we work with military pilots to get them free of duty.

Q You mentioned about certain lines may have more hours of flying than other lines, is that correct?

T. 285

A...Those with check marks are people senior to him of patterns that he could have bid. Barry was awarded the first line. The known commitment days were the 4th and the 5th.

You can see that a line here, and a line here and a line here were free of duty for the assignment of his military commitment on the 4th and 5th.

We relieved him of those trips for his National Guard on the 3rd and the 4th of this particular month. His military records show that he did not attend the military and, in fact, he did attend the military on the 8th, 9th and 10th.

MR. LEVIN: I'm going to object to the witness -- if he's referring to some record, I think we should see it. I think--

A The actual records -- if I may answer, the actual records come from what Gary gave us.

THE COURT: No, sir, Mr. Leonard -- Mr. Leonard, I understand your interest in the matter, but you have to answer only the questions, and do not comment on counsel's observations.

I heard your objection. It's sustained. Now, go forward please.

MR. TINAGLIA: Okay. Your Honor, as to the objection, if I could address one point, they have the records that were produced.

THE CLERK: Case on trial.

THE COURT: Are you ready to go?

MR. MCLAUGHLIN: Yes, you Honor.

THE COURT: Is everybody here?

MR. MCLAUGHLIN: Yes, your Honor.

THOMAS LEONARD, DEFENDANT'S WITNESS, PREVIOUSLY SWORN DIRECT EXAMINATION (cont'd).

BY MR. MCLAUGHLIN:

Q Captain Leonard, you recall you are under oath?

A Yes.

Q When we left off before lunch we had just gone through the pattern boards and we are still focusing on scheduling problems with Mr. Pignato. You went through five pattern boards, were those the only schedule conflicts or concerns that you experienced with Mr. Pignato?

A No, they were not. There were others each month. Those are just representative of the type of problems.

Q What were the problems caused by Mr. Pignato's scheduling efforts?

MR. LEVIN: Once again I am going to object, your Honor, foundation, we are talking about a four-year period.

THE COURT: All right, just narrow it to a time frame so counsel knows what you are --

MR. MCLAUGHLIN: Well, generically I am talking about --...

T. 304,..306

A I am sorry, I don't understand, you mean how many years did it take to get that?

Q At what point in time did he have that amount of time?

A That was in May -- he indicated that in May of '88.

Q Okay, and so we can avoid the interruptions, if you can identify the periods of time you are discussing here it would be helpful.

A In the fall, which was approximately September of 1988, Gary was given a first officer evaluation ride for that program. He received an adequate score on that evaluation ride, one of 80 percent, which was acceptable to upgrade to first officer on the 727.

He was entered into the 727 program for upgrade, ground school. In the winter of '88 he completed that -- in January of '89. However, he completed that with some difficulty.

Q Could you describe for the Court what those difficulties were?

A His ground school was satisfactory, his simulator, I was asked by the check airman to come over during the fifth period --.

MR. LEVIN: I object to the hearsay, Judge, and I might add if there is an evaluation in November of '88 we haven't even received the document. Now we are apparently hearing what the check airman is saying.

THE COURT: I think we are in January of 89.

THE WITNESS: We are in January of '89.

MR. LEVIN: Okay, it is still hearsay if we are talking about what a check airman said to him. We don't have a document or report that shows that.

MR. MCLAUGHLIN: Your Honor, we are not offering that for the point of what was being said.

THE COURT: Well, we haven't heard what he said anyway.

Testify from your first hand knowledge if you can, sir.

Go ahead. January of '89.

BY THE WITNESS: A (Continuing) January of '89 I proceeded to the simulator to give Gary his fifth simulator evaluation ride to see if we wanted to continue with the training. The ride was marginal but I elected to and it took Gary the full seven periods to complete 727 first officer simulator training.

It then took him 42 hours of IOE before the check airman would release him to the line. This is above the average it takes new first officer.

BY MR. MCLAUGHLIN:

Q All right, all of this is offered for the point of decribing the basis for your recommendations as to the 757

upgrade?

A That is correct.

MR. LEVIN: I object to that question. Now counsel is testifying.

THE COURT: I have got the picture. Just question him. Go ahead.

MR. MCLAUGHLIN: Thank you, your Honor.

BY MR. MCLAUGHLIN:

Q What was the other basis for your recommendation?

A Well as is my habit I continually talk to captains that are flying with first officers on the 727. When I talk with them I ask them how the pilot is doing in his capacity, what their weak points are. Gary was doing an adequate job but almost everyone that I talked to felt --

MR. LEVIN: I object to this, Judge, on the basis of hearsay. Now we have hearsay from even unspecified sources.

THE COURT: No, the supervisor, sir, and I won't receive it for the hearsay, I will only receive it for the purpose of showing what was said. So go ahead.

BY THE WITNESS:

A (continuing) That I would talk with them my conclusion was that Gary was progressing very well but could...

T. 326,..327

A...him his fifth ride in the simulator.

Q And when was that?

A That would be -- I would have to look at the records.

Q Do you know if that was in '88 or '89?

A It could have been at the end of '88, beginning of '89, because he finished IOE in January, so it very well could have been in December of '88.

Q Okay, is that the last check ride he had on a simulator before the one in November of '89?

A No, he would get a check ride at the end of the simulator time by the check airman that was conducting his training.

Q Would there be a report about that?

A There would be.

Q Okay, do you have either of those reports, the ones that might have occured at the end of '88 and the other one would have occured, when, the beginning of '89?

A The one would be at the end of the simulator training, and the next one would be approximately one year later, which was -- which we had in our possession a minute ago, which would be November of '89. There would be two proficiency check rides for the 727 in Gary's file plus the one in February, a total of three.

Q Okay, do you have the one with you from the year '88?

A It would be in his training record, and I am sure the lawyers might have it in their --

Q Because it is not part of the exhibits and we don't have it.

MR. LEVIN: Do you have that?

BY THE WITNESS:

Q It was satifactory.

BY MR. LEVIN:

Q Okay. Sir do you have that record with you today? Have you seen it today?

A I do not have it, no, sir, I do not.

Q Okay, so somewhere in ATA's records there is check ride -- there is a report of a check ride that Gary had in the simulator sometime in the year 1988?

A It would be a part of this initial training records, yes.

Q Okay, and that report that you referred to on direct examination is not present in the courtroom today, as far as you know?

A I do not have that in my possession, no.

Q You haven't seen it today?

A I have not seen it today.

Q You haven't seen it in the last?

A I probably have seen it in the last year.

Q I mean, it is easily accessible if you wanted to bring it to court, correct?

MR. MCLAUGHLIN: Your Honor, I object to this entire...

T. 333

MR. MCLAUGHLIN: Your Honor, I am not sure I understand the purpose of this. I will object to it to the extent that it goes to the attorney/client privilege.

THE COURT: Well, it is discovery anyway. The objection is sustained. Lets get on with it.

MR. LEVIN: Judge, I just might state that this witness' apparent basis for not including Gary in the update program in October of '89 was based on an evaluation that, frankly, we are finding out for the first time that was easily accessable and that we don't have here today. I think that it is a valid point to make.

THE COURT: Well, you can argue that to me. He testified as to what he did. I heard his testimony. Go ahead.

BY MR. LEVIN:

Q How many flying hours did Kaiser have in October of 1989?

A Bert Kaiser had approximately three and a half years on the 727 as a first officer plus what time he had earlier, he'd have about twenty-two or twenty three hundred yours.

Q Do you know how many hours Kirschner, Coons and Zalinski had?

A Kirschner had approximately 3500 hours, Coons was closer to three, and Zalinski probably in the neighborhood of 2500.

Q Did you consider military flying time in your analysis?

T. 341

(Question was read.)

THE COURT: That is too broad, yes. Sustained

BY MR. LEVIN:

Q Sir, did you ever have any discussions with Gary Pignato regarding his military commitments versus his employment at ATA?

A Yes, I can remember a discussion that I had with Gary prior to his upgrade as first officer.

Q And when did that discussion take place?

A That would have taken place in the fall of '88.

Q Okay, at that point in time, did you suggest to Gary that he had to make a choice as to what his first commitment would be?

A Not in those words, sir, no.

Q In substance, is that what you discussed with him?

A I asked Gary if he would make every attempt to bid his military assignments on his days off or his G days so that his pattern would remain intact.

Q And was this before or after you released him for upgrade?

A No, this was before he came from flight engineer to me for first officer on the 727, so he was just coming up to become a pilot from the flight engineer under this special program.

T. 364

Q...resolution, what issues are you referring to?

A The conflicts that were related to his marital problems.

Q Okay, now, the initial assessment of him was what, as referred to in the Termination Summary?

A That he had marital adjustment problem.

Q Specifically what did you say under the box "Initial Assessment"?

A It says specifically that he is free of vegetative signs of depression, there is no suicidal or homicidal ideation or intent, anxious and concerned about iminent divorce feels angry and confused but not sure how to handle this.

Q And what do you state as your treatment plan and progress towards goals?

A Quote that I did initial intake, client lost his job one to two weeks later, terminated secondary to lack of ability to continue.

Q Okay, and then under Termination Informationand Recommendation?

A Referred him at his request to Kenneth Young Mental Health Center Elk Grove. He was given a number and said he would call.

I noted he may call me for additional folow-up as needed.

Q Now, was that a request he had made of you after -- I take it then you had already known he was terminated at that time?

A Well, as best I can recall, on January 3rd of 1991, he missed a session. We talked about that. He had lost his job and apparently he wanted me to see him for free at that time, which I could not do, so I referred him to the local mental health center who would have been able to do a sliding scale arrangement with him if he so chose. Yet, on the other hand, he clearly, to the extent he was suicidal or was going to experience any servere problem, I was concerned about abandoning him and that he could call me if that was necessary.

Q Okay, would you read your notes of January 3, 1991?

A Sure. "Observation: Gary missed session today. He 'forgot'. Lost his job. Moved to Chicago with a friend. Cannot afford treatment. Wants me to see him for free. Explained I could not. He would like referral but doesn't know if he will follow up. Referred to Kenneth Young Mental Health Center. "He knows to call me if necessary. Case closed."

Q And he had called you on that day?

A I am not sure who called who. I can't recall.

Q Now, at this point during your interview with Gary Pignato, did he tell you that he was afraid of emphasizing his stress too much to his employer because it could affect his job?

A In March of '87? Yes.

Q What happened?

A I was called by scheduling to go to the scheduling area and I did, and Gary was on the phone.

Q What date was that?

A That was March the 12th, I believe.

Q All right, what occured?

A Gary was on the phone and he had a scheduled flight activity on the 14th of March, and he called to advise scheduling that he would be unalble to make the flight because he also had a commitment with the Reserves.

Q Now, had he informed scheduling, to your knowledge, anytime before that phone call with you that he had had military obligations on the 14th?

A No.

MR. LEVIN: Object to that on the basis of hearsay.

THE COURT: If he knows, he may testify.

BY MR. MCLAUGHLIN:

Q Your answer was no?

A No.

Q Okay

A Scheduling said he hadn't advised them earlier.

MR. LEVIN: Objection and ask that that be stricken.

THE COURT: It may stand.

BY MR. MCLAUGLIN:

T. 398,..399

A Yes.

Q All right, and what is the date of that memorandum?

A It is March 24th, 1987.

Q So that we are all clear, we are talking about a flight schedule for the month of April of '87; when would Mr. Pignato have received his bid schedule, the bid lines that he could then bid for that month?

A He should have received them approximately the 19th of March for April.

Q All right, and how long would he have to place his bids for April?

A Bids would probably close on the 23rd or 24th of March.

Q All right, and when would he know what lines he received?

A On or about March 26th.

Q Okay. Now, was the line he bid clear or did it conflict with his known military obligations?

A It conflicted with the military obligations.

Q All right, I believe you said he called in to crew scheduling, is that correct?

A Yes.

Q Do you know when he called crew scheduling?

A On the 9th of April.

MR. LEVIN: If I could just have a standing objection to the hearsay that is coming from crew scheduling?

I believe a substantial portion of his testimony comes from crew scheduling. I am mindful that the Court has overuled my objection --

THE COURT: Well, he is a supervisor and obviously he can't do everything himself. Those people who are his subordinates are able to report to him.

You can bring out on cross-examination, however, if there is doubt as to the accuracy of his knowledge, but I am allowing the testimony on the theory that he is in a supervisory position and that he has people who are reporting to him, and under those circumstances I am going to let him testify to both his own activities and the activities of those he supervised.

If you show on cross-examination that that is not so, you can move to strike the testimony.

MR. LEVIN: Then I will just add to my objection also a lack of foundation in that it is impossible for me to get to the bottom of this unless we know who he talked to and when, otherwise I am helplessly --

THE COURT: I will sustain your foundation objection.

MR. MCLAUGHLIN: All right.

BY MR. MCLAUGHLIN:

Q Who did you speak with from crew scheduling to find out what had occurred with Gary Pignato?

T. 428

Q How many hours?

A That is 66 hours and 26 minutes.

Q Okay, in your package do you also see the sheet for February of '87?

A Yes, I do.

Q And how many hours did he have there?

A It looks like 43 hours and 55 minutes.

Q And how many hours did he have in March '87?

A Seventy-seven hours and seven minutes.

Q How much is overtime? When do you start getting overtime?

A Seventy-five hours.

Q So in March of '87 when you were having the scheduling problems with him in fact not only had he worked approximately 27 hours beyond the average but he also worked overtime, correct?

A Correct.

Q Do you know if any flight engineer in the company in March of '87 had more hours than that?

A Oh, how would I know? And it is irrelevant.

Q Now, also -- I'm sorry, sir --

MR. LEVIN: Well, Judge, I think I will move on.

BY MR. LEVIN:

Q By the way, you fired Gary, so the record is clear, on

T. 455,..456

THE COURT: (cont'd) that.

MR. LEVIN: Thank you.

THE COURT: Go ahead. Put a question.

BY MR. MCLAUGHLIN:

Q I am sorry, you were relating what you knew and the basis for your termination. I believe you were discussing the second conversation between Michael Carlozzi and --

A I agreed with Michael Carlozzi that Gary should carry out his flight training as assigned.

I was informed later on the 17th that Gary had called back again and expressed that he was unfortunately undergoing some form of mental stress due to a marital situation and once --

MR. LEVIN: Objection, just for a foundation, Judge. I think we have to know who he talked to.

THE COURT: You will be able to cross-examine hime on that. Go ahead.

BY THE WITNESS:

A (continuing) And that he in fact would like to, as we say in the trade, drop the trip Mike Carlozzi related to me that he informed Gary Pignato --

MR. LEVIN: Judge, I don't mean to keep objecting,

but I don't know if this is the second conversation, the third conversation, or he had another conversation. I am just asking for foundation.

MR. MCLAUGHLIN: If counsel would listen briefly, we discussed the second conversation, he had said that before, we are still on the second conversation.

BY THE WITNESS:

A (Continuing) Okay, Captain Carlozzi is, in our speaking regarding his second conversation with Gary Pignato, Captain Carlozzi told me that he, Carlozzi, had informed Gary Pignato, words to the effect that, "If your are too sick to fly then call in sick," and that that had more or less been the end of the conversation. That conversation ended with Gary Pignato still being assigned to the training flight which he needed to leave his home base that night on the 17th.

Q Was there anything else that formed that basis for your decision to terminate him?

A I in fact learned later that evening from the crew scheduling department, a department which reported to me -- during that time frame in 1990 I was the vice president of flying operations, as I still am -- the scheduling department informed me that Gary Pignato had in fact called in sick --

MR. LEVIN: Object, no foundation and who he..

T. 460,..462

A...Gary Pignato, First Officer Gary Pignato.

Q And prior to that meeting had you made any arrangements for Mr. Pignato's flight arrangements for Mr. Pignato going back to Chicago?

A As a matter of fact, I had.

Q And why was that done?

A Well, it is pretty much standard operating procedure. It is a very delicate matter to hold one of these meetings which may or may not result in termination of employment. If it is determined to terminate the employment, you go through a very awkward period where you are trying to collect company materials and arrange for company paid transportation back home. We have a travel agency in-house in our headquarters, and it is a very simple thing for us to make reservations and purchase tickets in advance, or these tickets can be destroyed if they are not needed, and this lessens the stress at least to a minor degree should termination result.

Q So going into the meeting on the 31st, had you already made the decision to terminate Gary Pignato, or what was the status?

A I had made the personal decision to terminate Gary Pignato's employment unless he could provide some enlightening information regarding the incident in question, the abuse of sick leave, which might cause me to reevaluate the situation.

MR. LEVIN: Your Honor, may I have a moment to go to the washroom?

THE COURT: Sure.

MR. LEVIN: I am sorry, I just have to go to washroom for one second.

THE COURT: All right.

(bried pause.)

MR. LEVIN: Thank you, your Honor.

BY MR. MCLAUGHLIN:

Q At the meeting on December 31st, did Gary Pignato present you with any letter from a health care worker?

A Excuse me, but I believe we had an open question.

Q I am sorry.

MR. MCLAUGHLIN: Could we read back the last question?

(Record was read.)

BY MR. MCLAUGHLIN:

Q The question now is, at the meeting on the 31st, did Gary Pignato present you with any letter or other documentation from a social worker or health care provider?

A In fact, Gary provided Dick Meyers and I with a letter from some type of health care facility.

Q Did you read the letter?

A I read the letter.

T. 462

Q All right, what, if any impact on your decision did that letter have?

A The letter had no impact on my decision whatsoever.

Q And why not?

A Because nowhere in the letter did it state that Gary Pignato in fact did not attend company Christmas party while on sick leave, and beyond that, nowhere in the letter did it state that he was medically impaired, psychologically impaired to the point where he should have been disqualified from flying status.

Q During the meeting, did anyone ask Gary Pignato whether he was capable of performing his duties on the 17th or 18th?

A In fact, Richard Meyers, vice president of Human Resources, asked Gary a question to the effect, "Were you mentally impaired on the 17th of December to the point where you were unable to fly your trip as scheduled?

Q And how did he respond?

A He responded "No."

Q What, if any, decision did you make at the conclusion of your meeting?

A Shortly after looking at the letter, listening to Dick Meyers question, almost immediately thereafter I carried out my decision to terminate Gary Pignato's employment, and I informed him myself that I was terminating his employment from American Trans Air for abuse of company sick leave policy.

T. 474,..477

A...unfit for flying.

Q Sir, my question to you is, and I will get into those other aspects, is, did it make any difference to you in whatever decision you made as to the background or qualifications of the individual who provided the report to Gary Pignato that he provided to you?

MR. MCLAUGHLIN: For the record, you Honor, we object. He just asked that same question.

THE COURT: I think it has been covered, that question has been covered. He has answered you. He told you what he relied on.

BY MR. LEVIN:

Q So if it was an FAA surgeon and he said the same thing, you would have looked at it differently?

A Absolutely.

Q Okay --

A Because --

Q Was that part of ATA's --

THE WITNESS: I would like to finish my answer.

THE COURT: Let him answer. Go ahead.

BY THE WITNESS:

A (Continuing) If Gary Pignato in fact had declared to an FAA surgeon that he was mentally unfit to fly an American Trans Air flight, it would have disqualified him without

question from flight status and he would have lost his FAA medical flight certificate.

BY MR. LEVIN:

Q Okay, and he would have been terminated from ATA anyway, correct? I mean, he couldn't have flown for ATA if he provided that, could he?

A That is correct.

Q Okay, so short of providing that sort of document to you, you were going to terminate Gary Pignato at the December 31, 1990 meeting?

A My number one priority was that I needed to see some documentation that Gary Pignato in fact did not abuse company sick leave policy and conduct himself irresponsibly by obtaining -- by attending a company social event after turning down a flight assignment.

Q Sir, can a person be too stressed to fly but at the same time be able to go to a party?

MR. MCLAUGHLIN: I will object to the question.

MR. LEVIN: Judge, if I might respond, Judge apparently --

THE COURT: I will let him answer the question.

Q Sir, in your opinion, can an individual -- strike that. In your opinion, does it require the same level of physical and mental alertness to attend a Christmas party as it does to fly an airplane? Yes or no?

A I won't answer it yes or no.

MR. LEVIN: Judge, I would ask the Court to ask him --

THE COURT: Well, he says he can't answer it yes or no so put another question.

BY MR. LEVIN:

Q Sir, in your opinion, can an individual be too stressed to fly an airplane carrying over a hundred passengers but not be too stressed to attend a Christmas party? Can you answer that question?

A I am going to answer it as soon as I think it through, sir.

Q Can you answer it yes or no?

A No, I will not answer it yes or no?

THE COURT: It calls for an opinion, sir. He can either answer it yes or no or he can tell you he can't answer it yes or no.

MR. LEVIN: Okay, I will take his opinion then.

THE COURT: Okay.

BY THE WITNESS:

A In my opinion an airline pilot, and I think it is common knowledge, that an airline pilot's position is an extremely

responsible position, it requires stringent professional qualifications and honesty both with the traveling public, the Federal Aviation Administration and the company.

In my opinion, sir, an airline pilot who has declared that he is too mentally stressed to operate our flights should be under contant medical supervision, should have surrendered his medical certificate to the FAA, and has absolutely no business whatsoever attending a social function, and most important -- on the same night that he has declared himself ineligible to fly, and most certainly not an American Trans Air Company social event. That sir is my professional opinion.

BY MR. LEVIN:

Q Do you have an opinion as to whether or not it requires the same degree of concentration and responsibility to fly an airplane as it does to attend a Christmas party?

A I have an opinion that it does not take the same degree of mental capability to fly an airplane carrying passengers as it does to attend a social event.

Q Now, the letter you received from the health care professional stated that Gary Pignato was under the care of the health care professional, is that correct?

MR. MCLAUGHLIN: I object again, your Honor.

BY THE WITNESS: I do not have the document memorized --

Q...that correct?

A I in fact knew that Gary Pignato had used at least one sick day.

Q The one on December 17?

A No, prior to that.

Q Oh, you did review his record then?

A I reviewed Gary Pignato's record prior to this meeting.

Q Okay, when you reviewed his record for the year 1990, before the meeting of December 31st, did it show whether or not he had used his required number of sick days for the year 1990?

A I cannot answer that question.

Q An employee is entitled to seven sick days, are they not?

A That is correct.

Q Do you know if Gary Pignato used more than one?

A I do not know how many days of sick leave Gary Pignato used in 1990.

Q Do you know if he took any personal days in the year 1990?

A I do not know if Gary Pignato took any personal days in 1990.

Q Do you know if he took any sick days in the year 1989?

A I know that Gary Pignato took at least one sick day in either 1989 or 1990.

Q So you reviewed 1989 also, correct?

T. 498,..499

A I reviewed Gray Pignato's Personnel record and his training record.. I cannot quote you each item in those records that I personally scrutinized.

Q So you reviewed his record from '86, '87, '88, '89 and '90 before you terminated him? Is that what you are telling us?

A In gernal I reviewed Gary Pignato's records.

A During that time frame I reviewed Gary Pignato's records.

Q Did you see even one single violation of a company policy, rule or procedure during that entire period of time?

A Sick leave policy or procedure?

Q Any company rule, sir?

A Any company rule? Only to the extent that we had disagreements with Gary Pignato regarding bidding and scheduling policy.

Q So the only thing that Gary Pignato had ever done in the past that you interpreted to a violation of a company policy or rule potentially was disagreements you and he had over bidding procedures and practices, correct?

A That is correct.

Q And that is the conclusion that you reached when you reviewed his personnel record before you terminated him in December of 1990, is that correct sir?

T. 499

A That is correct.

Q Other than his terminattion in April of '87, was any disciplinary action -- strike that. He was terminated from April of '87 to July of '87, correct?

A That is correct.

Q And you if fact rescinded that termination, correct?

A No, that is not correct.

Q You found out about Gary Pignato's termination after it had taken place, correct?

A Right.

Q And you did not agree with the procedures as to how the termination was performed, is that correct?

A That is correct.

Q So you offered him reinstatement, correct?

A The company offered him reinstatement.

Q Well, sir you are the one who made that decision, correct?

A Decision to rehire Gary Pignato?

Q Yes.

A I was the Chief Pilot at the time, yes.

Q I am sorry, sir, did you not understand the question? You decided that the procedures used to fire him were not fair so you offered him reinstatement, correct?

A That is correct, we offered him reinstatement.

T. 502, 503

BY THE WITNESS: (last line)

A I recall Mike Carlozzi relating to me that he told Gary

T. 503

Pignato that if he was too sick to fly he should call in sick.

Q Well, Gary Pignato -- Mike Carlozzi told you that Gary Pignato talked to him about stress from his divorce, correct?

A This is correct.

Q Gary Pignato didn't say he was sick, he said he was stressed right?

A Yes

Q And Mike Carlozzi told you that he told --

A "Stress to me is a sickness?

Q Oh stress is a sickness? Okay so Mike Carlozzi told you though that he told Gary Pignato that if he felt too stressed to not fly , correct?

A To call in sick.

Q To call in sick?

A Yes.

Q Okay, and when you interviewed Gary Pignato December of 1990, on December 31st --

A Right.

Q -- he told you he felt stressed on December 17th , 1990, didn't he?

A He told us that he was not too stressed to fly.

Q But he told you he felt stressed, didn't he?

A He made the statement that he felt stressed.

Q And he went into great detail, did he not, about the...

T. 574

MR. MCLAUGHLIN: And that very fact substantiates everything that they did and everything that they have testified that they believe. It confirms that.

Mark Frey also said -- because the question is not was he suffering from some stress. The question is, was he sick to the extent that he could not perform his duties?

And Mark Frey confirmed, in fact, that Gary Pignato never told Mark Frey that he was incapable of flying, that Gary Pignato never even asked whether he should or could fly and, in fact, Mark Frey did not ever make a diagnosis or even suggest to Gary Pignato that he could not or should not fly.

The question becomes, what was it that he was too stressed to do?

And, again, the Court correctly zeroed in on the fact that on the 17th he was to ride in an airplane like any other passenger, and that in fact the first time he had any flight obligations were on the 18th and he in fact called in well on that date.

Counsel had cross-examinations of the American Trans Air witnesses tried to draw dichotomy between the stress required to fly a plane and the stress required to go to a Christmas party. That is not the issue.

The issue is, could he have ridden on a plane like anybody else?

And in fact, he quite clearly could have.

T. 173

Q And you didn't bid or select your military scheduled until after your American Trans Air schedue was awarded, correct?

A Unless there was a mandatory drill session.

T. 174

Q Right, but otherwise you could fit your AFTPs or your UTAs in wherever you needed to?

A That is correct?

Q And during '86, '87, '88, '89 and 90 you bid lines at American Trans Air which you were aware at the time conflicted with known military commitments?

A I bid all lines available to me.

Q And when you bid, you would bid lines and were awarded lines that you knew at the time when you placed that bid had conflicts with your military schedule?

A No.

Q Well, you knew your military schedule, correct?

A If it was mandatory, yes, I knew.

Q And if it wasn't mandatory, you could do it anytime you wanted?

A That is right.

Q During each of those years you bid schedules that conflicted with your ATA schedule, not every time, but you knew the schedule and you would bid for lines which you were aware would conflict with military schedules?

A And you say drill weekend schedules, is that -- I am sorry, I am not following your question.

MR. LEVIN: Judge, the witness has already answered the question and now that same question is being asked again.

THE COURT: He may inquire.

MR. LEVIN: I think he is personally confused.

THE COURT: Overruled. Go ahead.

BY MR. MCLAUGHLIN:

Q I am saying that you knew you placed a bid, you knew what your military weekends were and your military schedule and you placed bids that conflicted with that schedule with American Trans Air?

A I commonly bid my schedule according to my preference of flying or flying lines, and with regard to the military schedule, however, I bid every single schedule available to me and knew not what line I would be awarded until just before the end of the month.

Q But you knew if the lines were awarded on straight seniority, your uppermost line you could get was in conflict with your military schedule, didn't you? Again, not every time, but you placed those bids.

A Not purposely, no.

Q Is it your testimony that you did not, during those years, bid schedules that you knew conflicted with known military obligations?

A..I would have to answer that no with the fact that I bid for all schedules available to me since there are only ten lines of flying time.

Q Yes, sir, but knowing -- you knew which lines, based on

T. 366

A at some point in the interview my recollection is that he did raise his stress level, yes.

Q In the context that he didn't want a record of it so that it might affect his job?

A I suspect at some point in time he did raise that issue. I can't recall the specifics, but I beieve that at some point he did raise that he had a number of concerns about losing his job, and even in the medical record I indicated that he was on shaky ground with his employer.

Q Okay, and he had these concerns as of the intitial interview of December 17, 1990, correct?

A That is correct.

Q Could you read in your note of December 17th at 2030?

A Uh-huh. Would you like it just read out in its entirety?

Q Please.

A "Outpatient session number one. Saw patient alone. Took extensive history. Chief complaint impending divorce. Has multiple concerns about his future with respect to his divorce including custody, legal, financial. Feels wife has changed towards him both have many power and control issues. Denies suicidal or homicidal intent and ideation. Physically he is okay without vegetative signs of impression but anxiety is high. Apparently is on shaky ground with employer. Lied about health with employer to take time off. Feels need to continue in treatment, which is appropriate."

T. 367

Q Okay, in your opinion at the time you saw Gary on December 17th, was he showing signs of stress?

A He was showing some signs of anxiety, that is correct.

Q Did he ever cry at any time during the interview?

A He may have. I just cannot recall that. It

T.484

Q Gary Pignato was not fired for violating that policy was he?

A Gary -- excuse me one second, I am sorry. Is that policy in an ATA handbook somewhere the one you just dicussed?

A There is a policy in an ATA pilot's hand book called General Operations Manual that requires that a pilot maintain an FAA medical certificate.

Q Did Gary Pignato have an FAA medical certificate?

A We have on file in our training records for Gary a facimile copy of the FAA medical certificate that he is required to carry on his person, as all pilots are, at all times when operating an airplane.

Q Okay, in this particular case, on December 31, 1990, was Gary Pignato fired for violating this FAA policy that you have just described that is contained on the back of a medical certificate form?

A Gary Pignato was fired for the fact that it was apparent to me that there was no illness, no mental illness serious enough that he notified the FAA and disqualified himself from flight status so, therefore, he abused his responsibilities toward the company with regard to sick leave. If Gary Pignato had in fact suffered from a --

Q Are you still answering the previous question?

Q Is one of the factors that you consider whether or not the employee has violated other company rules in the past?

MR. MCLAUGHLIN: Your Honor, could I object to this? If he wants to relate specifically to one --

THE COURT: Overruled.

BY THE WITNESS:

A Would you repeat the question, please?

BY MR. LEVIN:

Q You have told us that one of the things you consider is whether or not an employee in past has violated the rule in question. I am now asking you, is another thing that you consider whether or not in the past the employee has violated other company rules?

A That would be one of the things I would consider.

Q Had Gary Pignato ever violated a company rule regarding sick days in the past before December 31, 1990?

A Not to my knowledge.

Q Had Gary Pignato ever used the allotted amount of his sick days at any time before December 31, 1990?

A I do not know how many sick days Gary Pignato had used prior to that date in 1990.

Q Did you review that before you terminated him.

A No, I did not.

Q So on December 31st, 1990, you didn't know whether or not Gary Pignato had even used a single sick day that year, is

T. 501

Q...copilot and flight engineer before you decide to terminate him?

A No, I did not.

Q Sir, company disciplinary policy in effect 1990 would have given you the option, if chose, to have verbally warned Gary Pignato, correct?

A I did not so choose.

Q You had that option, did you not?

A I did not choose to execise that option.

Q We know what you did, sir, but listen to my question. Under company policy in December of 1990, did you have the option to verbally warn Gary Pignato regarding what you perceived to be a violation of the sick day policy?

A I had that option.

Q And company policy, sir, in December of 1990, provided you with the option if a verbal warning didn't work to give him a written warning, correct?

A That is correct.

Q And, in fact, company policy says, does it not, that when somebody violates a rule for the first time and a verbal warning doesn't work that you give them a written warning, correct?

A The policy states that I may elect to do that.

Q And in fact it give that example. if you have a first time violation you give a verbal warning, and if the verbal...

Q.. Okay, when you relayed in detail what happened in the meeting, you don't discuss anything in there about the 757 discussion, do you?

A No, it is not on that page.

Q Okay, sir, did you and Gary reach a complete agreement as to how the bidding should be done in April of '90?

A We did not reach a complete agreement, no.

Q Okay, and the meeting terminated short of an agreement being reached correct?

A That is correct.

Q By the way, was what you were proposing to Gary Pignato to be a three tiered bidding process?

A I don't understand the term "three tiered bidding process.

Q Are you familiar with the Zetsman letter?

A Yes, I am.

Q Of December 21, 1989?

A Yes, I am.

Q Did that propose a three tiered bidding process?

A I can't quote it to you but I do know we discussed the Zetsman letter and John Zetsman was Gary's base flight manager in Chicago and they had a meeting to discuss the bidding process in 1989. followed up by a memo to John, and I

referred to that memo during my meeting in March.

Q And the process would be that first he would bid for lines that allowed him to perform his military training on G-days, correct?

A That is correct.

Q Secondly, he would bid for lines that would allow him to perform his military training on G days or blank days, is that correct?

A That is correct.

Q And, third, for lines that included the least amount of ATA flying and military training day, correct?

A That is correct.

Q And it was recognized that at some point in time there would be unavoidable conflicts where you would have bid lines that conflicted with blank days, correct? That's why you had the second tier there, right?

A That is right.

Q Okay, now, was this accompanied by a policy that was known to everybody?

A We have a policy on how to deal with military assignments.

Q Sir, was this policy that I just read to you, that you put in your affidavit, a company-wide policy, it did it just apply to Gary?

A No, this was a request to Gary.

T. 524

Q Oh, so this policy just was for Gary?

A..No, those requests are being adhered to on ongoing basis by the other 30 or 40 reservists that we have....

TO: Steve Cooper, Chief Pilot

FROM: Chief Flight Engineer

DATE: April 15, 1987

SUBJ: Employment Termination

Mr. G. Pignato refuses to fulfill his Military Training Assemblies on scheduled days off. Each month he attempts to fulfill his U.T.A.'s on days he has previously committed himself for duty with American Trans Air. Repeated advisories indicating that unscheduled time-off for military commitments can not and will not be tolerated has proven ineffective. American Trans Air has on several occasions changed his schedule and awarded leaves of absence in a spontaneous manner causing hardship to our operations. For this reason, I have elected to terminate Gary as Flight Engineer for American Trans Air effective April 17, 1987.

(EXHIBIT A)

Regards,

(signed Bert Kaiser)
Bert Kaiser
Chief Flight Engineer

cc: Mr. G. Pignato
file

AVIATION ACCIDENTS

The "Brief Extract of NTSB Accident Reports" below, taken from an NTSB computer print-out that is publicly available through the National Transportation and Safety Board (NTSB), covers some 400 aviation mishaps during the period 1983 to 1993 and shows a number of incidents in which investigators reported that pressure, stress or personal problems may have been contributing factors in those accidents. A wide variety of psychological factors come into play on review of these NTSB reports: suicide, drug abuse, broken romances, bankruptcy, indictment, mental overload, company pressure, impatience, death of spouse or child.

Petitioner does not submit this extract as proof that he should not have flown on December 17, 1990; that is a separate matter from the question whether, because of the known risk of aviation mishaps when flyers are under stress, unreasonable company disciplinary action can measurably increase that risk by driving pilots to ignore stress.

If this case is remanded, the trial court would have the opportunity to consider expert and anecdotal evidence on the levels and causes of stress and their relationship to aviation safety.

Brief Extract of FAA Accident Reports

page 105,	NTSB printout	Mar 12, 1985	fatigue
page 108,	" "	Mar 31, 1985	suicide
page 128,	" "	Jul 29, 1985	psychological condition
page 137,	" "	Sep 9, 1985	mission pressures
page 141,	NTSB printout	Sep 29, 1985	psychological condition
page 170,	" "	May 1, 1986	company pressure
page 172,	" "	May 27, 1986	mental condition overload
page 212,	" "	Sep 19, 1987	fatigue and stress
page 213,	" "	Sep 25, 1987	company pressure
page 241,	" "	Jan 3, 1989	company pressure

page 252, NTSB Printout Jul 18, 1989
fatigue and stress

page 254, NTSB Printout Aug 6, 1989
despondent over marital failure

page 260, NTSB Printout Nov 6, 1989
personal problems

page 263, " " Feb 7, 1990
company pressure

page 279, " " Feb 9, 1991
professional and personal problems

page 285, NTSB Printout Jul 13, 1991
pressure debt

Attached is the first page of NTSB computer printout above.

Status	Date	NTSB ID No. Reg. No. Docket No.	City, State: Airport Proximity Airport Name (Ident.)
Public ACC	01/05/83	SEA83FA037 N537OY/ 158	PORTLAND, OR:Off Airport/ 7 miles/ PORTLAND TROUTDALE (TTD)

Aircraft Make; Model/Damage	Type of Operation	Operator/ D.B.A.	Injuries F S M N
CESSNA T210N Destroyed	135 N-SchAir Taxi Cargo"	AAR WESTERN SKYWAYS, INC./	1 0 0 0

THE ACFT COLLIDED WITH THE SIDE OF A HILL DURING A DESCENT. THE PILOT HAD CANCELED HIS IFR CLEARANCE AND RADAR SERVICES WERE TERMINATED AND A FREQUENCY CHANGE WAS APPROVED. SHORTLY THEREAFTER THE ACFT WAS OBSERVED FLYING BENEATH THE CLOUDS TOWARD THE HILL WITH WHICH IT COLLIDED. THE WITNESSES REPORTED HEARING THE ENGINE AND SEEING THE ACFT ENTER CLOUDS FOLLOWED BY THE NOISE OF AN EXPLOSION. THE WEATHER WAS IMC. THERE WERE NO OPERATIONAL DIFFICULTIES REPORTED OR NOTED.

No." Occ Phs Subj Mod Pers
1 230 551 In flight collision with terrain Descent normal
F 19200 2416 Terrain condition Mountainous/hilly
C 24010 3109 4000 In-flight planning/decision Improper Pilot in command
C 31201 5000 Self-induced pressure Pilot in command
F 20000 2214 Weather condition Low ceiling
C 24015 3118 4000 VFR flight into" IMC Initiated Pilot in command
C 31160 5000 Over confidence in personal ability Pilot in command